

"FINANCIAL MISCONDUCT":

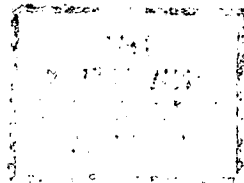
THE CAPACITY OF

MATRIMONIAL PROPERTY LAW

TO PROVIDE A REMEDY

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I hereby certify that the work embodied  
in this thesis is the result of  
original research and that it has not  
been submitted for a higher degree  
to any other University or institution.

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In order to prevent a husband from co-ercing his wife into transferring her separate estate to him, in the late eighteenth century<sup>22</sup> Lord Thurlow created an exception to the general rule that equity declares void any attempt to impose a direct restraint upon a disponee's powers of alienation.<sup>23</sup> Henceforth a practice developed whereby property transferred for the separate use of a married woman was given "without power of anticipation", although a similarly worded limitation would suffice.<sup>24</sup> The married woman was thereby disabled during coverture from alienating the property or anticipating its future income. Just as the restraint protected the wife against a predatory husband, it also operated against her creditors. While she could devise or bequeath the property in question, she could neither sell nor mortgage it, not could her creditors claim it in satisfaction of any debts she might have owed them.<sup>25</sup> Courts of equity had no jurisdiction to override or modify a particular restraint on alienation in the interests of the married woman who was subject to it.

Because of the basic economic changes caused by the Industrial Revolution with its attendant specialisation of the labour and concentration of production in factories, society also changed. It became more mobile and more urbanized and many wives gained employment in the new factories.<sup>26</sup> Very little production was now carried out in the home and the husband, away at work for long periods, found that his power position in the family was weakened.<sup>27</sup> Since changes in the family had economic causes, these were most likely to be reflected in that field of the law most closely tied to the economy, that is, property.<sup>28</sup> As the wife began to receive income (and in some cases, accumulate property), reform of the common law doctrine of coverture was imperative. Well-to-do women could enjoy the benefits of property drafted marriage settlements incorporating the equitable notions of separate estate and restraints on anticipation, but poorer women lacked these advantages and, to the extent that they had assets, they suffered the full rigours of the common law.<sup>29</sup> As Glendon puts it:<sup>30</sup>

"While ... protective devices kept the daughters of the wealthy secure in their gilded cages, the husband had complete control over most of the wife's property among the great mass of married couples".

This control enabled him to use that property as he wished.



PART BTHE MARRIED WOMEN'S PROPERTY LEGISLATION(a) Reform of the common law's view of matrimonial property:

It has been suggested that the impetus for reform of the property system came from the press agitation of nineteenth century authoresses and actresses in receipt of substantial incomes from their personal labours.<sup>31</sup> Certainly, the libertarian John Stuart Mill exerted an influence. In his essay, "The Subjection of Women",<sup>32</sup> he wrote:

"(T)he inequality of rights between men and women has no other source than the law of the strongest. Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house ...".

Elizabeth Cady Stanton, one of the leading American feminists of last century, believed that the motive behind the reform should be expressed as follows:

"Fathers who had estates to bequeath to their daughters could see the advantage of securing to women certain property rights that might limit the legal powers of profligate husbands.

Husbands in extensive business operations could see the advantage of allowing the wife the right to hold separate property, settled on her in time of prosperity, that might not be seized for his debts".<sup>33</sup>

Whatever the reasons behind the legislation, the Married Women's Property Acts<sup>34</sup> had the effect of ending coverture and extending the protection of equity to all women. Subject to the imposition of restraints upon the powers of alienation and anticipation, married women were now permitted to assert full rights of ownership over, and to exercise full powers in respect of, their property.<sup>35</sup> Corresponding legislation, based on the English Act of 1882, and introducing the concept of married women's separate property to Australia, was enacted in Victoria, South Australia and Tasmania

in 1884, in Queensland in 1891, in Western Australia in 1892 and in New South Wales in 1893.<sup>36</sup> It was also enacted in New Zealand, the United States and Canada.<sup>37</sup> Each Australian State (with the exception of New South Wales and Western Australia) now has legislation declaring a married woman's property to be her own rather than her separate estate; in all States, except New South Wales, legislation forbids restraints upon a married woman's powers of anticipation and alienation, since protective and discretionary trusts may now be used to save married women from their economic irresponsibility; and each State has introduced a scheme of interstate succession to pre-empt the husband's common law right to succeed to so much of his wife's estate as consists of personalty.<sup>38</sup>

The legal regime of separation of property had the advantages<sup>39</sup> of simplicity.<sup>40</sup> The concept was familiar to the middle and upper classes, who for generations had made use of the marriage settlement to protect their daughters' property. It lacked the alien connotations of the European community of property system and it accorded well with "... the currently fashionable notions of philosophical individualism under which the legal subordination of one sex to the other should (it was said) be replaced by 'a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other' ".<sup>41</sup>

(b) Disadvantages of the system of separate property:

Paradoxically, less than a century after its establishment, the system which was created to further married women's rights and at the time of its introduction had received great acclaim was being condemned as having given rise to injustice.<sup>42</sup>

The concept of separate property is incompatible with the notion of marriage as a partnership<sup>43</sup> that emerged during the social upheaval of the Second World War.<sup>44</sup> While one might expect a partnership to give rise to partnership property, the system of separate property regards spouses, not as equals, but as strangers at arm's length.<sup>45</sup> It does not take into account:<sup>46</sup>

"... the fundamental difference between the economic relationship of persons doing business as strangers and the economic relationship of spouses. As a result

it reinforces and magnifies the economic inequality arising out of the fact that there is no economic value accorded the role of homemaker, no economic reward given to the spouse who works in the home, keeping house and raising children, performing the 'normal woman's role'. It fosters economic dependency when the marriage breaks down".

The separate property system provides no safeguards against a spouse who may dissipate family assets or deliberately divest title to them, nor is there answerability where secret trusts and dispositions for inadequate consideration are concerned.<sup>47</sup> One of the most serious defects of the separate property system before legislative safeguards were introduced was that the spouse who held the legal title to the matrimonial home could sell it to a third party without the knowledge of the other spouse, with the result that the latter could be rendered homeless. In National Provincial Bank v. Ainsworth,<sup>48</sup> the House of Lords held that while a wife had a personal right against her husband to provide a roof over her head, this "mere equity" could not affect a bona fide purchaser for value who took without notice of the equity.

There are disadvantages of the separate property system even after the death of one party for it does not give a spouse property rights in the other's estate. Intestacy law awards a share to the surviving spouse, but this is not because the survivor is regarded as being entitled to a share of the estate but rather because it is assumed that this is what most couples would wish at their death.<sup>49</sup> A spouse is able to completely disinherit his partner, subject only to the discretion of a court under the Testator's Family Maintenance legislation<sup>50</sup> to provide for the maintenance of the survivor:

"Consistently with the concept of separate ownership the law has a very individualistic attitude to property matters between spouses at death. Moreover, the Family Provision legislation can be frustrated by the parties giving away property before they die. The legislation only operates on what is left behind and there are no provisions<sup>51</sup> enabling a survivor to reach inter vivos dispositions".<sup>52</sup>

Further, if a testator leaves his property by will to anyone other than a dependant, the legatees will have great difficulty in ascertaining what property passes under the bequest in the face of an adverse claim by a spouse.

Intrinsic in the separate property system is the need for a non-titled spouse to apply to a court as a place of first resort for a declaration of property entitlement.<sup>53</sup> As Kovacs points out,<sup>54</sup> "... rights are uncertain and expensive to ascertain, and the parties' assets may be substantially dissipated in the legal costs of ascertaining them anyhow".

## PART C

### THE INTERVENTION OF EQUITY

Just as equitable principles which had been developed to protect the property of the well-to-do from the harsh consequences of the common law were the foundation of the Married Women's Property legislation which extended the system of separation of property to all women, so the Courts of Equity set about modifying its unfair aspects in the true Aristotelean tradition<sup>55</sup> of modification of the law where it is defective owing to its universality.<sup>56</sup>

No attempt will be made in this study to give a detailed analysis of the case law nor to canvass the academic comment, but rather a simple exposition of the principles of equity as they can affect the ownership of property as between the parties to a marriage will be made.

A woman owns only what is hers, that is, what she has purchased or acquired by way of gifts or inheritance. At common law, a binding gift can be effected by express language in a deed or by a donor's present intention to pass property to a donee together with actual or constructive delivery of the property into the possession of the donee.<sup>57</sup> Unless the husband takes action clearly indicating that he intends the items to be hers absolutely, "gifts" do not belong to the wife.<sup>58</sup> A husband can even stipulate that his wife's clothes, purchased with his money, are to remain his property.<sup>59</sup>

Where intention to give is expressed in the future rather than the present tense, then prima facie the donor can break his or her promise and revoke the gift, at any time. A promise alone is therefore legally ineffective but such future intention to give may be legally binding where the donee acts in reliance upon the donor's statement under such doctrines as unilateral contract (when equity will order specific performance),<sup>60</sup> proprietary estoppel<sup>61</sup> and constructive trust<sup>62</sup> (in both of which cases equity will imply a proprietary interest).

Equity presumes a bargain, not a gift,<sup>63</sup> and equity will not perfect an imperfect gift,<sup>64</sup> so if an apparent donee fails to prove that a gift has been made, equity will imply a resulting trust to the donor.

Where a husband provides the purchase price for property such as land or shares and conveys it to his wife, or he deposits money in a bank account in her name, equity presumes that he intended to make a gift unless evidence in rebuttal of this "presumption of advancement" is tendered,<sup>65</sup> but "... to rebut a presumption of advancement the evidence must be cogent".<sup>66</sup>

The High Court observed in Charles Marshall Pty. Ltd. v. Grimsley<sup>67</sup> that:

"Apart from admissions, the only evidence that is relevant and admissible comprises the acts and declarations of the parties before or at the time of the purchase ... or so immediately thereafter as to constitute a part of the transaction. If that evidence is insufficient to rebut the presumption, the beneficial gift, absolute or subject only to qualifications imposed upon it at the time, is complete and no subsequent changes of mind or dealings with the property inconsistent with the trust by the donor can as between himself and the donor alter the beneficial interest".

No presumption of advancement is implied where a wife conveys property into the name of her husband. In that case, a resulting trust is presumed in favour of the donor.<sup>68</sup> Where there is a

voluntary transfer of personalty into the joint names<sup>69</sup> of the transferer and the transferee, it is presumed that the transferee holds his interest as a resulting trust for the benefit of the transferer<sup>70</sup> except where the transfer is made by a husband to his wife, in which case the wife will hold her interest beneficially. A voluntary payment from one person to another does not give rise to the presumption of resulting trust as a gift is presumed,<sup>71</sup> or the presumption of advancement applies because the payment is made by a husband to his wife.

There are dicta from Lord Reid, Lord Morris, Lord Hodson and Lord Diplock in Pettitt v. Pettitt<sup>72</sup> to the effect that the presumption of advancement is no longer of importance but, in Tinker v. Tinker,<sup>73</sup> it was held that it still operates between husband and wife, despite what had been said Pettitt. Freeman<sup>74</sup> is of the opinion that, with the exception of improvements to the matrimonial home or to personal property, the presumption applied in contemporary cases works an injustice.<sup>75</sup> It still applies in Australia.<sup>76</sup> As recently as 1981, in Woolley (No. 2)<sup>77</sup> Nygh J. applied the presumption to decide the fate of a \$3000 gemstone, and in Calverley v. Green,<sup>78</sup> the nature and basis of the presumption was discussed by Gibbs CJ., Mason and Brennan JJ. Gibbs CJ. stated that he would be prepared to apply the presumption in cases of de facto marriages of some permanence, although on the facts of the case before him the presumption was rebutted.<sup>79</sup>

As far as the presumption of resulting trust is concerned, when two or more purchases contribute to the purchase of the property and the property is conveyed to them as joint tenants, the equitable presumption is that they hold the legal estate on trust for themselves as tenants in common in shares proportionate to their contributions. That basic presumption may be displaced by a counter-presumption or rebutted or qualified by evidence of the common intention of the parties who contributed to the price at the time the purchase was made.<sup>80</sup> Where a married couple have contributed to the acquisition of the property, it may be inferred that they intend to be joint beneficial owners.<sup>81</sup> In Calverley v. Green,<sup>82</sup> Deane J. expressed the view that the presumption of resulting trust may be found to be of practical importance only where the evidence does not enable the court to make a positive finding of intent, while Murphy J.<sup>83</sup> went so far as to say that

presumptions of resulting trusts are inapplicable except where the dispute falls within the terms of the Family Law Act 1975 (Cth.).

In certain situations, equity requires the person in whom the legal title to property is vested to hold it as trustee for the benefit of another. Where a party has gained an interest in property for a considerable undervalue<sup>84</sup> or has perpetrated a fraud, equity will impose a trust.<sup>85</sup> "Fraud" is a term which is used in many senses, but in equity it generally refers to no more than the unconscionability of asserting particular legal rights.<sup>86</sup> The Statute of Frauds of 1677 was passed in order to discourage unscrupulous litigants from pursuing false or groundless claims with the help of manufactured evidence; legislation based on it has been part of English law ever since. Cardozo J. once described the statute as the result of "... the peril of perjury and error (which) is latent in the spoken word".<sup>87</sup>

Without fulfilment of the requirements of the Statute of Frauds with respect to land that contracts for its disposition or the disposition of any interest therein must be in writing; that the legal interest in land can only be conveyed by deed; that an interest in land, albeit equitable, can be created or disposed of only in writing; and that the creation of a trust respecting any interest in land must be provable by writing,<sup>88</sup> a purported conveyance of land or the purported creation of a trust or disposition of an equitable interest in land will fail. However, the legislation expressly excepts the creation or operation of resulting, implied or constructive trusts.

Equity will not allow a statute to be used as an instrument of fraud. Where it would be unconscionable for the legal owner to rely on the statute to defeat the claim of the other party contrary to the terms of the oral agreement between them, the court will enforce the trust.<sup>89</sup>

A party may also enforce an oral contract relating to land if he, the plaintiff, has partly performed his side of the bargain. The justification which has most frequently been given for disregarding the requirement of writing is that, where the plaintiff has partly performed the agreement, the defendant "... is really charged upon the equities resulting from the acts done in reliance

on the contract, and not (within the meaning of the statute) upon the contract itself".<sup>90</sup> Lord Selborne in Maddison v. Alderson<sup>91</sup> was of the opinion that, to be sufficient, "... the acts relied upon as part performance must be unequivocally referable to some such agreement as that alleged". Australian courts accept this approach<sup>92</sup> but the position in England is still not settled.<sup>93</sup>

Cases concerning matrimonial property may present particular problems. As Lord Hodson indicated in Pettitt v. Pettitt,<sup>94</sup>

"(t)he conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque".

Indeed, there may be a feeling in such a situation that "... to talk of property matters at all indicates a distrust, or at least an attitude inconsistent with that which is appropriate amongst persons newly living together".<sup>95</sup> In circumstances where there are nevertheless likely to be arrangements or understandings with respect to land and those arrangements are unlikely to be documented, the principles preventing the use of the statutory requirements as an instrument of fraud play an important role.<sup>96</sup> In cases coming within its jurisdiction, the Family Court of Australia may, under s.79 of the Family Law Act 1975 (Cth.), alter existing property rights where it is just and equitable so to do,<sup>97</sup> but where the parties are not able to invoke its jurisdiction or the jurisdiction which arises under either s.161 of the Marriage Act 1958 (Vic) or s.30 of the Family Court Act 1976 (W.A.),<sup>98</sup> the ordinary rules of property law and equity law must be applied.

The principles relating to implied or resulting trusts and the presumption of advancement (supra.) have proved to be inadequate to resolve problems relating to the ownership of property as between husband and wife where the parties intend that their respective beneficial interests will be other than a precise reflection of their contributions to the purchase price or where the contributions of the party in whom the legal title is not vested are indirect.<sup>99</sup>

In response to the problem, Lord Denning and the English Court of Appeal in a line of decisions<sup>1</sup> developed the doctrine of "family assets",<sup>2</sup> which held basically that where both parties were



contributing to the general expenses of the family, this was evidence from which the court could infer an implied pooling arrangement or joint venture and, accordingly, the parties should share the beneficial interest in the "family assets" acquired from the pool irrespective of where the legal interest lay.<sup>3</sup> Not surprisingly, some of the decisions were greatly at odds with established property law principles, and, in Pettitt v. Pettitt<sup>4</sup> and Gissing v. Gissing,<sup>5</sup> the House of Lords put an end to the doctrine of "family assets", supplanting it in the latter case with a "trusts approach".<sup>6</sup> The courts, it seems, were not to be concerned with dispensing "justice" but with the consideration of "... the cold legal question" of property rights.<sup>7</sup>

Unfortunately, the Law Lords differed in their expositions of the relevant principles, but there does appear to have been a consensus in each case in relation to the general proposition that the court will, by the imposition of a trust, give effect to the agreement or common intention of the parties as to the manner in which the beneficial interests are to be held. Opinions varied as to the nature of the necessary intention. It has been suggested that since the trust described by Viscount Dilhorne<sup>8</sup> and Lord Diplock<sup>9</sup> arises out of, or implements, the expressed or implied intention of the parties, it clearly falls within the realm of resulting trusts.<sup>10</sup> This view was accepted by Bagnall J. in Cowcher v. Cowcher.<sup>11</sup> He concluded that there must be between the parties an arrangement or consensus as to the extent to which each party was to be treated as having contributed to the purchase price of the matrimonial home.

Bagnall J's analysis was rejected in Re Densham<sup>12</sup> by Goff J., who took the view that "... in the vast majority of cases, parties do not direct their minds to treating the money payments as notionally other than they are. What they think about, if they think at all, is ownership".<sup>13</sup> The relevant trust in his view was an express trust. However, such a trust would not be unenforceable by reason of the statutory writing requirements because it would be fraudulent for the defendant to seek to rely upon non-compliance with these requirements in the circumstances of the case before the court.

The conclusion thus reached by Goff J. accords with that reached by the New South Wales Court of Appeal in Allen v. Snyder,<sup>14</sup> where it was held that the court cannot impute to the parties a common intention which they did not have.

On the other view of what was decided in Gissing v. Gissing,<sup>15</sup> it has been contended that, for Lord Reid, Viscount Dilhorne and Lord Diplock, the trust arises out of equity's long established jurisdiction to impose constructive trusts in order to prevent one party enjoying the fruits of unconscionable behaviour towards the other.<sup>16</sup>

Subsequent decisions of the English Court of Appeal have favoured this second interpretation and have carried it to the point of imposing a trust, even in the absence of agreement, wherever necessary to do justice between the parties, thereby, in effect, reviving the "family assets" doctrine. In these decisions, therefore, the concept of "unconscionable behaviour" is used not merely as a reason for imposing a trust once the respective rights of the parties have been established on the basis of an agreement expressed or implied from the surrounding circumstances: it is used as a criterion for determining what the interests of the parties actually are.<sup>17</sup>

The "trust by imputation"<sup>18</sup> was rejected by the New South Wales Court of Appeal in Allen v. Snyder.<sup>19</sup> The judgment in that case of Glass J.A., with whom Samuels J.A. agreed, contains a valuable analysis of the relevant principles. His Honour referred to the fact that the courts will give effect to the parties' common intention as to the manner in which the beneficial interest in land is to be held, notwithstanding the fact that the common intention is not evidenced in writing and therefore does not comply with the statutory writing requirements. His Honour rejected the view that, where the respective intended shares of the parties did not co-incide with their respective contributions to the purchase price, the relevant trust could still properly be described as a resulting trust. Rather, it was an express trust which lacked writing. As it was founded on the actual subjective intentions of the parties, it could not be described as a constructive trust, these being imposed without reference to the intentions of the parties. The occasional descriptions of the trust as a "constructive

trust", his Honour said, could be explained by reference to the fact that the trust would be enforced, even in the absence of writing, because reliance by the trustee on the statutory writing requirements would constitute an equitable fraud.

His Honour considered that the proposition that a trust could be imposed otherwise than to accord with the actual intentions of the parties was wholly inconsistent with the line of reasoning in a series of High Court decisions culminating in Hepworth v. Hepworth.<sup>20</sup>

Australian courts have accepted the view that the basis for the imposition of the constructive trust is equity's general jurisdiction to prevent the party with legal title from behaving unconscionably.<sup>21</sup>

The fraud often present in the matrimonial property dispute is the fraud inherent in a party seeking to rely upon a statutory requirement of writing to defeat the beneficial interest created by an agreement or common intention to which he was a party. Similarly, it may well be regarded as fraudulent for a legal owner to deny a beneficial interest vested in another person by reason of that other person's contributions, direct or indirect, to the purchase price of the property. It is, however, quite another matter to hold that the conduct of a legal owner is fraudulent if he has not been a party to any agreement or common intention whereunder the beneficial interest is to be vested in a person other than himself and he has not received from that other person any benefits which they may have agreed to treat as contributions to the purchase price of the property.

What is needed to establish a common intention is a matter of contention, as a comparison of Lord Diplock's approach in Gissing v. Gissing<sup>22</sup> with that of O'Bryan J. in Hohol v. Hohol<sup>23</sup> illustrates.

According to Lord Diplock, it would be necessary to show that the parties made an agreement akin to a bargain, although they may not have had any intention to enter into legal relations, but O'Bryan J. was of the opinion that it may be sufficient to show

that after the formation of the parties' common intention, the claimant acted to his or her detriment. On this view, which is close to that underlying the doctrine of proprietary estoppel, it will be unnecessary to go so far as to show that the activities of the claimant were specifically contemplated by the parties at the time the common intention was formed.

Hardingham and Neave<sup>24</sup> support the latter view because of its flexibility. It is submitted by the present writer that there seems to be no logic in drawing a distinction between acts required to be done or otherwise expressly agreed to by the parties and other acts done in reliance upon the promise that a beneficial interest has been or will be conferred upon the non-titled party.

No clear principles have yet emerged as to the size of the contribution which must be made by the claimant before the court will regard it as unconscionable for the legal owner to resile from the parties' common intention.<sup>25</sup> Hardingham and Neave<sup>26</sup> are of the view that it is arguable that, even where a common intention is clearly manifested, it will not be unconscionable for the legal owner to resile from that intention unless the claimant's contributions have been reasonably considerable.

It appears, on the other hand, that in trusts arising from the principle of proprietary estoppel (variously called "equitable estoppel" and "equity of acquiescence"), the contribution made by the claimant can be quite minimal.<sup>27</sup> The crucial factor is that the claimant has changed his or her position, either in the active or the passive sense, on the faith of the inducement.<sup>28</sup>

In view of the number of decisions in which the doctrine of proprietary estoppel has featured, it appears to be the "growth area" in matrimonial disputes where one party's contributions to property in the name of another are concerned. In some decisions in which it has been used, the court in its deliberations has come close to accepting the doctrine of unjust enrichment which is used in Canada in determining these questions.<sup>29</sup> This was certainly the case in McLelland J.'s judgment in Morris v. Morris.<sup>30</sup> Simply because the woman changed her position in reliance on the promise that she would have an interest in the property, his Honour held

that the defendant was estopped from denying her claim, even though there was no agreement within the guidelines laid down in Allen v. Snyder.<sup>31</sup> As Evans<sup>32</sup> points out, this comes close to saying that an equity can arise from receipt of a benefit unless the circumstances do not otherwise provide some juristic reason why the benefit should be retained free from any obligation to pass a proprietary interest.

For Kirby P. of the New South Wales Court of Appeal in the recent decision in Baumgartner v. Baumgartner,<sup>33</sup> the principle in Allen v. Snyder<sup>34</sup> fails to reflect societal change. First, his Honour drew attention to the statement of Mason and Brennan JJ. in Calverley v. Green<sup>35</sup> to the effect that it is arguable that a constructive trust ought to arise where property, beneficially owned in certain proportions, was maintained or enhanced by work done or contributions made in different proportions. Also, the New South Wales legislature, in enacting ss.20 and 38 of the De Facto Relationships Act 1984, has enabled the court to take into account "... a wide range of contributions, by either party, to the acquisition, conservation or improvement of assets and to the welfare of the other partner or the family generally".<sup>36</sup> Further, in a number of decisions,<sup>37</sup> judges have applied the principle in Allen v. Snyder<sup>38</sup> "with the greatest reluctance"<sup>39</sup> because of what they saw as the manner in which it drove them to results which appeared unjust. For these reasons, Kirby P. indicated that the decision may need to be reviewed in order to reflect community attitudes.

On the other hand, Mahoney JA. delivered a conflicting judgment, expressing the view that the proprietary rights of parties involved in a dispute about the ownership of property ought not to depend on the view taken by a judge as to what is fair between them.

Mahoney JA.'s view was that taken by the High Court in Muschinski v. Dodds,<sup>40</sup> a case which was decided after Baumgartner.<sup>41</sup> All of the Justices, either expressly or impliedly, stated that fairness is not a basis on which to support a declaration of a constructive trust. Particularly cogent is a statement made by Deane J.:<sup>42</sup>

"The fact that the constructive trust remains remedial does not mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundations of such principles".

For Australian courts, then, the re-introduction of "palm-tree justice" has been refused and the principles of Pettitt v. Pettitt,<sup>43</sup> Gissing v. Gissing<sup>44</sup> and Allen v. Snyder<sup>45</sup> remain the law.

CHAPTER THREELEGISLATIVE REFORM OF THE SEPARATE PROPERTY SYSTEMPART ATHE JURISTIC BASES FOR REFORM(a) The need for reform:

Equity had proved unequal to the task of modifying the severity of the Married Women's Property legislation. Nor was judicial discretion to provide the answer: in 1956, the High Court of Australia in Wirth v. Wirth<sup>1</sup> held that "... the title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion".<sup>2</sup> In England, Lord Denning's attempts to distribute "palm-tree justice"<sup>3</sup> on the basis of a purported discretion conferred by s.17 of the Married Women's Property Act 1882, which in his view "... transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit",<sup>4</sup> were brought to an abrupt end by the House of Lords' decisions in Pettit v. Pettit<sup>5</sup> and Gissing v. Gissing.<sup>6</sup>

According to the ordinary principles of law and equity which the courts were bound to apply as a result of these decisions,<sup>7</sup> the "solid tug of money"<sup>8</sup> usually ensured the entitlement of a financial contributor.<sup>9</sup> An indirect contribution had a similar result only if the contribution was substantial and it could be inferred that the expenditure in question was referable to the acquisition of the property concerned.<sup>10</sup> Not only did the homemaker's unquantifiable contribution go unrecognised (and lie vulnerable to denial by the other spouse, usually the husband) but also a wife who had contributed to the general running expenses of the home or had failed to keep a strict account of all acquisitions and had not ensured that her moneys were ear-marked and applied towards the purchase of defined articles would have acquired few tangible assets.<sup>11</sup>

The judiciary was conscious of the need for reform,<sup>12</sup> but "... lawyer's law"<sup>13</sup> was not capable of deciding issues directly

affecting the lives or large sections of the community. It was up to the legislature to provide the solution.<sup>14</sup>

(b) The heterogeneous nature of early reform:

Because there were no clear ideas about the juristic basis on which the transmutation of the system of separation of property should proceed, early attempts at reform, though numerous, were piecemeal. They were largely concerned with individual items of property, such as the matrimonial home, or specific situations of the spouses, but not with property as a whole.<sup>15</sup>

A major reason for this heterogeneous approach was the fact that, until the 1950's, the English lawyer thought of, and sought, the rules that have now amalgamated into "family law"<sup>16</sup> under the disparate disciplines of "divorce", "law of persons", "domestic relations", "parent and child", "husband and wife", "married women's property" and so on.<sup>17</sup> Until these constituents were fused into the new and discrete subject of "family law"<sup>18</sup>, the legal principles and doctrines of each part, having been developed separately, could not be fully worked out and rationalised, unlike the established disciplines such as land law, contract and tort.<sup>19</sup> That there was no term "matrimonial property regime" in English legal language before this time is ample illustration of the lack of attention that the law of property as between husband and wife had been given, nor is the fact of omission surprising, since one of the fundamental principles of English law was that a spouse owned his or her property just like anyone else.<sup>20</sup>

It was not until 1965 that permanent Law Commissions were set up in England and Scotland.<sup>21</sup> However, in its inaugural programme, the English Law Commission included a review of the whole of family law. Pursuant to this, it convened a seminar at All Souls College, Oxford, in 1966, and at this both divorce reform and matrimonial property were for the first time subjected to comprehensive study.<sup>22</sup>

The science of sociology was in its infancy when the Married Women's Property legislation was first enacted; comparative jurisprudence was a barely developed discipline; and the behavioural



sciences were a thing of the future. Little thought was given to how the principle of equality, with its emphasis on the husband and wife as individuals, was to be reconciled with the essential unity of the family.<sup>23</sup> Moreover, the concept of the family's economic status has changed considerably in the century or so since separation of property was introduced. As Sir Otto Kahn-Freund has observed, the idea that a "... husband and wife should share the benefit of any increase in their wealth produced during the marriage by their work or thrift is a postulate which arises from the present stage of development of Western society".<sup>24</sup>

Unfortunately, such statements as this, more often than not, have been based on subjective judgment because empirical research into matrimonial matters is a recent development. Its importance was first recognised in the United States. In England, sampling on a comprehensive scale has been practiced only since the establishment of the Law Commission as a permanent institution. Major studies were conducted there in 1972 and 1977<sup>25</sup> and the Law Commission has made specific recommendations relating to matrimonial property,<sup>26</sup> but, in Australia, the Family Law Act 1975 (Cth.) was passed without the benefit of any local studies.<sup>27</sup> Currently, however, the Australian Law Reform Commission, which is conducting the Matrimonial Property Inquiry,<sup>28</sup> chaired by Professor David Hambly, has obtained data from two comprehensive projects.<sup>29</sup> One was a survey of property proceedings in all registries of the Family Court of Australia and the Family Court of Western Australia.<sup>30</sup> The other project, which was planned as a co-operative arrangement between the Commission, the Family Court of Australia and the Australian Institute of Family Studies, studied the experience and attitudes of a structured sample of about 900 divorced men and women.<sup>31</sup> The people in the sample group, who accepted an invitation from the Chief Judge of the Family Court to participate,<sup>32</sup> were interviewed about their financial and property arrangements during the former marriage; the arrangements made immediately after separation; their current economic circumstances; their negotiations on property and financial matters and their experiences of the legal process; and, finally, their attitudes to some policy issues which underlie the Commissions's inquiry.<sup>33</sup>

(c) The concept of marriage as a partnership:

That marriage is a partnership of equals is a concept that appears to have emerged as a result of the social upheaval of the war of 1939 to 1945. This was made clear by the Report of the Royal Commission on Marriage and Divorce (England) - the Morton Commission Report - in 1956:<sup>34</sup>

"(M)arriage should be regarded as a partnership in which husband and wife work together as equals, and the wife's contribution to the joint undertaking, in running the home and looking after the children, as just as valuable as that of the husband in providing the home and supporting the family".<sup>35</sup>

The war-time practice of wives going out to work has continued in time of peace<sup>36</sup> and the doctrine of equal pay for equal work now holds sway.<sup>37</sup> Women tend to continue working after marriage, or to resume paid employment at a later stage of married life when children have been reared. The family budget is commonly fed by the earned income of both husband and wife, but in most households there is no strict accounting of how the combined income is applied to expenditures. In some marriages the pooling of separately-earned income has enabled the accumulation of capital assets above and beyond the matrimonial home and its furnishings, while a previously-married spouse may bring significant assets into the marriage.<sup>38</sup> For most married persons, marriage is seen as "... a practical union of both lives and property".<sup>39</sup> Friedmann,<sup>40</sup> however, has drawn attention to the fact that matrimonial property law must not fail to "... take account of the quantitatively small but qualitatively important number of cases where the husband and wife have separate property of some magnitude or own 'separate' businesses of their own". In such instances, separation of property<sup>41</sup> provides the only just solution.

By deliberately adopting a system of common ownership of "matrimonial joint stock"<sup>42</sup> for such assets as the matrimonial home,<sup>43</sup> the furnishings of the home, their bank accounts and their small savings, many couples have departed from the principle of separation. Some items of property can fairly be seen as "... truly

representing the fruits of a totality of efforts of wage-earning, homemaking and mutual support".<sup>44</sup> Other items are acquired by each spouse separately and simply used in common. For a family in harmony, this creates no legal difficulty, and at this stage the parties "... would regard any attempt to apportion ownership as pointless or even as exhibiting an undesirable lack of trust",<sup>45</sup> but, when a marriage breaks down, an almost impossible task may fall on the court to determine the ownership of such assets used in common for the purposes of the family.<sup>46</sup> As Llewellyn so picturesquely puts it:<sup>47</sup>

"Between the spouses when split impends ... (t)he quondam partners may agree on the division (of property), but if they do not, their disagreement will be peculiarly embittered, peculiarly troublesome to solve. Some believe her, others him. The air is alive with assestions, accusations, 'promises', 'agreements', denials. It takes an official to determine what is what, and what to do".

The concept of partnership between husband and wife is not that of a commercial partnership: "... (i)t is instead the unique community of life and purpose which characterises the ideal relation of husband and wife".<sup>48</sup> There is no intention that there should be a strict accounting between the spouses<sup>49</sup>, for both are seen as equal partners in co-operative labour, each making an essential contribution towards the economic viability of the family unit, and therefore towards the accumulation of matrimonial property.<sup>50</sup> However, Professor Kahn-Freund<sup>51</sup> points out that there is a distinction between the "internal" relationship between the spouses (that is, "the obligations they owe one another with regard to both the use of the income derived from property and to the distribution of the substance or value") and the contrasting "external" relationship between them (that is, "the allocation of the power of disposal which the spouses or either of the spouses have against outsiders and the position of outsiders towards the property").<sup>52</sup>

The developing notion of a partnership situation between husband and wife was foreign to the common law, which has a "commercialistic disposition".<sup>53</sup> The result was "... a quite

indefensible form of discrimination between ... wage-earning and homemaking roles".<sup>54</sup> In view of the current blurring of the spousal roles, it is imperative that the apportionment of matrimonial property on divorce should not favour one conjugal role in preference to another,<sup>55</sup> nor should one party to the marriage be allowed to manipulate uncertainty over the allocation of equitable interests in order to disadvantage the other spouse.

(d) The question of domestic contribution:

The first legislative attempts to provide for recognition of domestic effort as a means of acquiring an interest in property were hampered by the inability of the judiciary to sever the bonds of orthodox property law. While s.86 of the Matrimonial Causes Act 1959 (Cth.) and s.5(3) of the Matrimonial Property Act 1963 (N.Z.) gave the courts comprehensive powers to adjust the property relations of spouses regardless of legal and equitable interests, and therefore gave the woman a higher statistical probability of sharing in the property built up by her husband during the course of their marriage, she did not necessarily have a legal "right" in this respect.<sup>56</sup> Law concerns rights and duties. According to Hohfeld, a "right" (or claim) is a duty placed on another (or others) to act in a certain manner. Legal rights can therefore serve as the basis for jural relations. "Privileges", on the other hand, are correlatives of "no rights".<sup>57</sup> The spouse who wishes to have recognised an equitable claim to property built up during the marriage has to pray the indulgence of the court and the result of his or her application for equitable relief is by no means certain. He or she has no legally enforceable right but only a privilege to bring a claim.

The courts were ill-equipped to grapple with the concept that a homemaker's contribution could serve to acquire an interest in property. At first, it was set aside lest there be any "pecuniary prejudice" to the financially contributing spouse.<sup>58</sup> Even when the fact that non-monetary contribution could serve as a means of purchasing an interest in property was eventually recognised, the courts at first required more than the performance of ordinary services.<sup>59</sup>

A more liberal approach to the wife's contribution was advocated by the High Court of Australia in Sanders v. Sanders<sup>60</sup> and by the Privy Council in a New Zealand case, Haldane v. Haldane.<sup>61</sup> In the latter case, the Privy Council was of the view that a remedial approach should be adopted to the New Zealand legislation, whose property provisions resembled those of the Matrimonial Causes Act 1959 (Cth.), since the Act seemed to them to give statutory effect to the "Rule in Heydon's Case".<sup>62</sup> Thus they endeavoured "... to ascertain what was conceived to be wrong with the New Zealand property law before 1963".<sup>63</sup> They concluded that the law of separate property was "... inadequate to secure justice to the generality of married women who have neither land, investments nor professional earnings",<sup>64</sup> and that the statute had been enacted because "... marriage has come to be regarded as a partnership of equals, even though the equal partners performed widely different functions".<sup>65</sup>

On the question whether the foundation for equal sharing of property is established merely by the fact of marriage or whether the Act rested on the proof of an earned claim, the Privy Council was of the view that the fact of contribution limited the court's jurisdiction under the 1963 Act. Therefore, they explicitly rejected the notion that the Act instituted any sort of formal regime of community of property. However, the contribution required to bring the court's discretion to alter property interests into play was minimal and could be supplied by "... the usual domestic contributions of an ordinary housewife, and not only (by) the contributions of a thrifty and frugal one".<sup>66</sup>

Even so, there was no clear idea about the juristic basis on which recognition of the fact of contribution rested. According to one view,<sup>67</sup> a woman's domestic contribution should be recognised because she has given up paid services in the labour market in order to make a home and nurture children.<sup>68</sup> On another view, that of Sir Jocelyn Simon, President of the Probate and Divorce Division, and later Lord Simon of Glaisdale, the wife's acquisition of an interest in property in the name of her husband can be attributed to the fact that "... the cock can feather his nest because he does not have to spend time sitting on it".<sup>69</sup> While the first approach, which is reminiscent of the notion of "pecuniary prejudice",<sup>70</sup>

ultimately leads to the result of re-adjustment of property interests, the perspective is not an accurate reflection of the matrimonial partnership, during which both spouses normally make a positive contribution to the accumulation of property. It is difficult to conceive of a negative contribution serving as a means of acquiring property.<sup>71</sup> As for Lord Simon's approach, it is submitted that the man would still have engaged in economic pursuits had he not married, and he would in that case not have had the burden of providing a home and sustenance for a wife and children.<sup>72</sup> However, Lord Simon's view has been accepted by English courts and by the Family Court of Australia.<sup>73</sup> It was also adopted by the High Court of Australia in Mallett v. Mallet,<sup>74</sup> especially by Mason and Dawson JJ..<sup>75</sup>

The Victorian Parliament in 1962 responded to the problem of recognising domestic contribution by legislating for a presumption of equal ownership of the matrimonial home. The Marriage (Property) Act amended s.161 of the Marriage Act 1958 (Vic.), the equivalent of s.17 of the Married Women's Property Act 1882 (Eng.), in a deliberate attempt to give effect to the changing status of marriage as more of a partnership than formerly<sup>76</sup> and "to negative the restrictive judgment of the High Court in Wirth v. Wirth".<sup>77</sup> Gray<sup>78</sup> is of the opinion that the legislation represented "... a remarkable fusion of the common law and community property traditions". The economically disadvantaged spouse's contributions were implicitly recognised by s.161(4)(b), whereby equality of ownership of the matrimonial home was presumed. However, the presumption operated only when a dispute arose between the spouses and proceedings were brought under the Act.<sup>79</sup>

What the reform amounted to<sup>80</sup> was nothing more than the substitution of a presumption of joint ownership for the rebuttable presumption of advancement, or other presumptions of law and equity, such as resulting trusts. The presumption of joint ownership was itself rebuttable, for it was subject to sufficient evidence to the contrary on the part of the spouses, or to the special circumstances rendering it unjust to make the substitution. As Finlay puts it,<sup>81</sup> "... while the Victorian expedient (went) as far as possible within the limitations of palm tree justice to mitigate the rigours of the traditional approach to married women's property,

it was subject to its own limitations ... (I)t had the inflexibility of a statutory rule and the limitations that flow from such inflexibility".<sup>82</sup>

Sackville<sup>83</sup> urges the repeal of the "common intention restriction" upon the court's discretion and its replacement by an amendment ensuring that the rebuttal of the statutory presumption of joint tenancy does not deprive the court of its residual jurisdiction to re-organise the parties' proprietary rights. Moreover,<sup>84</sup> s.161(4)(a) directs the court to disregard "any conduct of the husband or of the wife which is not directly related to the acquisition of the property or to its extent or value". The word "conduct" has been taken not to be "... confined to conduct of a moral connotation"<sup>85</sup> and, accordingly, a wife's domestic services are not to be regarded as a contribution as they are only indirectly related to the acquisition, extent or value of the matrimonial property. This result flows from the drafting of the legislation, for it was not intended by the legislature.<sup>86</sup>

As a result of the enactment of the Family Law Amendment Act 1983 (Cth.), it is possible that the application of s.161 of the Marriage Act 1958 (Vic.) may be very limited, provided that the purported extension of the jurisdiction of the Family Court by the insertion of paragraph (ca)(i) in the definition of "matrimonial Cause" in s.4(1) is held by the High Court to be constitutional.<sup>87</sup>

The English Law Reform Commission in the Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978)<sup>88</sup> recommended the introduction of what Baxter referred to as "... a community regime reduced to the matrimonial home".<sup>89</sup> It was proposed that, subject to a contrary agreement, all matrimonial homes by operation of law would be jointly owned on a matrimonial home trust.<sup>90</sup> The recommendation had a mixed reception and it has not been implemented,<sup>91</sup> but it was the basis of legislation establishing deferred community of property in New Zealand, Ontario and Saskatchewan.

That the legislatures and the courts were fumbling with the notion that domestic services warranted recognition is perhaps not surprising when one considers that their quantification in monetary

terms is notoriously difficult.<sup>92</sup> Sociologically, the matter also presents difficulties. For example, Nygh J. has pointed out<sup>93</sup> that "... a childless wife who sits at home in relative idleness may be said to have made little or no effort". At the other end of the scale, a woman may be in full-time employment yet also carry out domestic services: should she be seen as making a greater contribution?<sup>94</sup> Should the extent of property acquisition be scaled down because the wife merely stays at home since she considers herself entitled to be supported or since, on early breakdown of marriage, she could be said to have left the job unfinished?<sup>95</sup> What of the benefits the wife has received during the marriage in the form of gifts, the sharing of prosperity or overseas trips, or should these be balanced against the fact that she has, say, kept the books and acted as an unpaid telephonist in the husband's business and entertained his business associates?<sup>96</sup>

The legislatures in England and Australia solved the problem of making a precise analysis of the value of domestic contribution by enacting legislation<sup>97</sup> which provided for a discretionary adjustment of property interests at the time of divorce.<sup>98</sup> However, while the performance of "ordinary" domestic services is ranked as a contribution towards the acquisition of property, conferring upon the wife a "moral claim" or "accrued" beneficial right to share in that property after divorce,<sup>99</sup> as an equitable interest it stands to be postponed to a bona fide purchaser for value without notice (actual, implied or constructive)<sup>1</sup> of the prior equity.<sup>2</sup> In the case of personal property, however, the purchaser will not normally be required to investigate title or be fixed with notice of an outstanding equitable interest if he or she fails to do so.<sup>3</sup> Thus, in the absence of actual notice, a spouse who has acquired an equitable interest in goods or other personalty will usually be unable to enforce it against a third party purchaser or mortgagee, except where statutory provisions affect priority conflicts in respect of goods or other personalty.

(e) The uncertain nature of equitable interests:

Under the Torrens system of land registration practiced in Australia, a caveat may be lodged to protect an equitable interest. To be caveatable, such an interest must specify the quantum of the



estate claimed and the facts on which it is founded.<sup>4</sup> A wife who is unaware that she has an equitable claim cannot lodge a caveat to protect it, and even if she is aware that her contribution may give rise to some kind of claim, her legal adviser may have difficulty in drafting a caveat with a sufficient degree of precision. Joske J. strongly attacked the unfairness of this in Gasiunas v. Meinhold.<sup>5</sup> Hardingham and Neave<sup>6</sup> stress that even though difficulties may well arise in characterising and quantifying an interest to be protected with sufficient precision, the task should be attempted.<sup>7</sup>

Since it is only by going to court that parties can have their property interest clarified, rights are uncertain and expensive to ascertain. Further, during the currency of the marriage, creditors find it difficult to determine in advance what assets will be available for the satisfaction of their claims.<sup>8</sup> Lord Wiberforce's statement in National Provincial Bank v. Ainsworth<sup>9</sup> is apposite:

"Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties and have some degree of permanency or stability."

The fact is that the law fails to create present rights to property in the spouse who lacks legal title but may nevertheless have an equitable interest in it. Instead of having a certain and vested share, that person has only the right to apply to a court for the declaration of his or her equitable interest. Consequently, the separate property system provides no immediate safeguards against a spouse who may dissipate assets or deliberately divest the family of them through outright gift or transfer for inadequate consideration. Subject only to the discretion of the court under the Testator's Family Maintenance legislation<sup>10</sup> to provide for the survivor,<sup>11</sup> except in New South Wales, where sections 21 to 29 of the Family Provision Act 1982 empower the Supreme Court of New South Wales to deal with certain "prescribed transactions", a testator has complete freedom to bequeath his property as he wishes. It appears that, despite the amendment of the Family Law Act 1975 (Cth.) by the Family Law Amendment Act 1983 (Cth.) which by s.79(8)<sup>12</sup> allows the continuation of s.79 proceedings after the death of a party,<sup>13</sup> provided that they are on foot, the surviving party may

resort to State Maintenance legislation if he or she desires. The High Court in Smith v. Smith (No.3)<sup>14</sup> has held that there is no inconsistency between the Family Law Act and State Testator's Family Maintenance legislation so the State legislation's operation has not been curtailed by the operation of s.79(8)<sup>15</sup>. If s.79 proceedings have not already been set on foot, a divorced spouse in all States except for New South Wales, South Australia and the Territories must be in receipt of, or be entitled to receive, maintenance before she is an eligible applicant<sup>16</sup> under State Maintenance legislation.<sup>17</sup>

Unless the legal estate in the matrimonial home is vested in the spouses jointly, the consent of both to the disposition of the matrimonial home is not normally required.<sup>18</sup> The English Law Commission's proposal that the husband and wife should become statutory co-owners of the beneficial interest in the matrimonial home would still allow the party who owned the legal as well as the beneficial interest to dispose of the property without the other party's consent.<sup>19</sup> In order to protect the non-titled spouse, the Law Commission put up a proposal, hitherto not acted upon by the legislature, for a system of registration of the equitable interest.<sup>20</sup> Temkin<sup>21</sup> claims that the choice of registration as the lynch pin of the system is highly questionable, particularly since it has already proved in the context of the Matrimonial Homes Act 1967 to be a less than ideal method of safeguarding equitable interests. Since registration would not be mandatory, sale or mortgage of the legal interest in the home might well still take place without the other spouse's knowledge.<sup>22</sup>

The essential question seems to be upon whom the burden of self-protection should lie. The Law Commission would place it on the untitled spouse because of the conveyancing problems which would otherwise arise. However, the House of Lords in Williams and Glyn's Bank v. Boland<sup>23</sup> took a different view. As a result of the decision, in the case of registered land (the position with unregistered land is unclear), banks lending on second mortgage will henceforth have to secure their position by obtaining the consent of occupants with beneficial interests in the property. The House of Lords thus placed the burden of self-protection on those best equipped to bear it. As Lord Scarman put it:<sup>24</sup>

"Nor must the courts flinch when assailed by arguments to the effect that the protection of (the wife's) interest will create difficulties in banking and conveyancing practice. The difficulties are, I believe, exaggerated: but bankers, and solicitors exist to provide the service which the public needs. They can - as they have successfully done in the past - adjust their practice, if it be socially required".

It appears that Australian Courts are also prepared to place the burden of self-protection on those best equipped to bear it. In Heath and Heath; Westpac Banking Corporation,<sup>25</sup> Nygh J. postponed the interest of the bank in the matrimonial home although it had been a purchaser for good consideration because it had not acted bona fide; it had notice of the wife's property claim and a search of title would have revealed her caveat. However, there are dicta to the effect that, in the absence of being put on notice and having made due search, a bank is not obliged to enquire into the marital status of customers before making loans. The importance of placing a caveat on the title to property to protect equitable interests is apparent, therefore.

The Ontario Law Reform Commission in its co-ownership proposal also recommended that third parties should bear the burden of self-protection since

"(i)t would be most unrealistic to require registration as a condition precedent to (equitable interests). ... It is extremely unlikely that very many spouses living in harmony would pursue this course".<sup>26</sup>

Instead, it recommended that the beneficial interest of the non-titled spouse in the matrimonial home, without registration, should prevail over the claims of purchasers, mortgagees and creditors who transact solely with the spouse holding the title. Accordingly, it took the view that

"(T)hird parties seeking to acquire or secure a beneficial interest in residential premises should be

obliged to satisfy themselves that the subject property is not a matrimonial home or to require the consent of the non-titled spouse in the prescribed form".<sup>27</sup>

The position regarding the ownership of household chattels is also complex.<sup>28</sup> They may be held under the ordinary principles of law and equity (as under the laws of the Australian States), subject to the adjustment jurisdiction of the courts at the time of divorce, or they may be regarded as equally owned (as in New Zealand and Ontario, where the Matrimonial Property Act 1976 (N.Z.) and the Family Law Reform Act 1975 (Ont.) respectively established a deferred community of property system providing a jurisdiction on divorce to divide equally the aggregate of the matrimonial property acquired during marriage, other than by gift or inheritance), or their use and enjoyment may be considered to be an incident of the occupation of the matrimonial home (as in Saskatchewan and as recommended by the Law Commission in England).<sup>29</sup>

Under the first alternative, recourse must be had to the courts for the grant of an injunction to restrain dealings in the goods or for a declaration of property interests. Kovacs is of the view that the injunctive and declaratory powers are rarely invoked with respect to household chattels because of the uncertainty of outcome inherent in the separate property system. The expense of litigation is also a limiting factor, so that self-help is a more attractive alternative.<sup>30</sup>

In jurisdictions which consider family chattels to be equally owned, little advantage accrues, since the equalisation claim is not heard until dissolution. Provision is made for the granting of an injunction to restrain a disposition which is meant to defeat the claim or rights of another, or for the setting aside of such a disposition provided that it has not involved a bona fide purchaser for value.<sup>31</sup> However, recourse must still to be had to the court: apart from bringing proceedings for equalisation, there appears to be little that can be achieved to protect the non-titled holder against dissipation of the property.

The third alternative, that is of viewing the right to use and

enjoy household goods as an incident of the occupation of the matrimonial home, also has its limitations. The English Law Commission envisaged that the right would not arise as a matter of law in the person in occupation of the home but only on the granting of an application by the court. While the Saskatchewan scheme is similar, it contemplates that the right to possession of the goods is primarily to give effect to the right to occupy the home. Accordingly, there is a freeze on dealings with household goods until a court order can be obtained.<sup>32</sup> While this approach inhibits the de facto disposition of goods by stealth, it is submitted that there is no connection between the right to occupy the house and the right to use and enjoy household goods.<sup>33</sup>

It appears that the provisions of the Family Law Act 1975 (Cth.), if judiciously invoked, can be used to achieve the best features of each of the schemes involved. The injunctive power under s.114 is available to order a party to leave household chattels in the home or, alternatively, to hand them over for the use and enjoyment of the other party. A provision forbidding the seizure of goods without a court order, unless in the case of hardship,<sup>34</sup> would prevent, or at least inhibit, the use of self-help. Further, the slackening of constitutional constraints on property proceedings predating proceedings for principal relief by the Family Law Amendment Act 1983, if found to be intra vires by the High Court of Australia,<sup>35</sup> has provided for a speedy distribution of assets to be made by the Family Court.<sup>36</sup>

(f) The scope of the property to be divided:

It is obvious that the scope of the property to be divided at the time of divorce is an important issue, while at the same time it is clear that the division of some property other than according to strict property entitlements is antithetical to the principle of separation of property. What is defined as marital property, as distinct from personal property, is increasingly being determined by the stipulations of divorce decrees in the Western world. The old rules by which family wealth and family property have been transmitted on the occasions of marriage and death have been complicated by divorce as an additional factor.<sup>37</sup>

While Lord Upjohn voiced the opinion in Pettitt v. Pettitt<sup>38</sup> that "... the expression 'family assets' is devoid of legal meaning and its use can define no legal rights or obligations", Lord Diplock recognised that spouses acquire some property, real or personal, "... either in contemplation of their marriage or during its subsistence (which is) intended for the common use and enjoyment of both spouses or their children".<sup>39</sup> Eekelaar<sup>40</sup> points out that if the entitlement to such property rested on economic assessment of contributions alone, it is unlikely that a case for equal sharing of assets could often be made out, yet, as we have seen, most married couples are committed to the ideal of marriage as a partnership and favour the equal distribution of "partnership" property. What, then, of the so-called "new property" (superannuation entitlements, long service benefits and the proceeds of life assurance policies and the like)? Is this "partnership" property? The concept of "new property" was popularised by a Yale University Professor, Charles Reich,<sup>41</sup> who suggested that, for most people, one's employment or profession, and work-related benefits such as pensions, are the principal forms of wealth,<sup>42</sup> and that, for many others, claims against the government are the main source of subsistence. As such, he argues that they should be accorded the protection that the legal system has accorded more traditional forms of wealth. To Reich's perception of "new property" may be added such factors as qualifications, access to employment and fringe benefits.<sup>43</sup> During a stable marriage, benefits of all such human capital are shared between the spouses, either in a pecuniary sense or in the quality of life that the spouses experience. However, since human capital is personal and the earnings which are its returns accrue to the individual over time, the costs and benefits are not shared when the marriage partnership is dissolved.<sup>44</sup>

Other problems arise. Should the sharing of property be equal in every marriage<sup>45</sup> or should business assets and property gained by one party through gift or inheritance be excluded from consideration? Property acquired before marriage logically should be excluded but it may have assumed the characteristics of commonly-owned property because of mixing or because, over a long period of time, it has been treated as if it were jointly owned. The treatment of income from assets of these types also creates difficulties.<sup>46</sup>

Because of the diverse aspirations of married couples, it may be that the parties should be allowed, prior to marriage, to decide what property they intend to treat as jointly owned and which as separate property and reduce the agreement to contract. The right to contract out<sup>47</sup> in this manner is a feature of jurisdictions with statutory matrimonial property regimes.<sup>48</sup> It is of particular significance to individuals who marry for a second time or others who already own property at the time of marriage.<sup>49</sup>

Under the present system of separation of property, which allows cohabitation contracts, except under the De Facto Relationships Act 1984 (N.S.W.), pre-nuptial contracts<sup>50</sup> are considered to be contrary to public policy<sup>51</sup> and in no way will they operate to oust the court's jurisdiction.<sup>52</sup> It is not possible for married persons to contract out of the system of property distribution<sup>53</sup> unless the couple go to the trouble of having the agreement ratified by the Family Court under the terms of s.87 of the Family Law Act 1975.<sup>54</sup> It appears that the Family Court would be unlikely to sanction such agreements without there being principal proceedings imminent between the parties<sup>55</sup> since further obligations might arise out of the marital relationship so that the Court, accordingly, would not be able to say that the agreement was a "proper" one for it to approve at any given time within the meaning of the Family Law Act 1975.<sup>56</sup>

The decision of the New South Wales Court of Appeal in Seidler v. Schallhofer<sup>57</sup> suggests a trend away from the enforcement by the courts of traditional moral standards towards the extension of financial protection to the individual.<sup>58</sup> Academic writers support the principle of "contracting out" as a means of combatting the harsh effects of the system of separation of property<sup>59</sup> and the Joint Select Committee which inquired into the Family Law Act<sup>60</sup> stated that the law ought to facilitate negotiated settlements to property claims between divorced spouses.

As mentioned above, cohabitees who live in New South Wales may regulate financial matters between them by means of a cohabitation agreement.<sup>61</sup> Section 47 of the De Facto Relationships Act 1984 (N.S.W.) provides that such an agreement will be respected

by the court provided that it is in writing; that it is signed by the partner against whom it is sought to be enforced; and that it has been drawn up under the guidance of a solicitor so that, at the time that the agreement was formed, in the light of reasonably foreseeable circumstances, its provisions were fair and reasonable. Section 48 provides for judicial discretion to override the terms of the agreement where the circumstances of the parties have so changed since the agreement was entered into that it would lead to "serious injustice" if the provisions of the agreement were to be enforced.<sup>62</sup>

Provisions such as these would provide a suitable model for pre-nuptial contracts. The requirement that a contract be drawn up after legal consultation with the parties independently of each other would prevent overreaching and unfairness. Further, the parties would be informed as to the likely outcome if a matter of dispute were put before a court,<sup>63</sup> and the provision for overriding judicial discretion would overcome criticism that such contracts made early in a marriage, or before it, might be completely inappropriate later.<sup>64</sup> Already, under the Family Law Act, it has been held<sup>65</sup> that there is a statutory obligation on the parties to a marriage to disclose assets and income in relation to a separation agreement. Failure to disclose assets amounts to fraud, enabling the Family Court to revoke its approval to an agreement under s.87 of the Act. It is unlikely that the same duty of disclosure would be held to be inapplicable to pre-nuptial contracts.<sup>66</sup>

Even though the Australian Law Reform Commission doubts whether there would be a wide use made of the right to "contract out" of the legal matrimonial property system, unless either or both of the parties had been married previously,<sup>67</sup> it is submitted that once legislative provision for such contracts were provided, wider use would be made of them by those persons contemplating marriage.

The approach of the Australian and English legislatures has been to define "property" in relation to the parties to a marriage or either of them as property "to which those parties are, or that party is ..., entitled, whether in possession or



reversion". (See s.4(1) of the Family Law Act). At the time of divorce, all the property of the parties, howsoever acquired, is to be taken into account, but distribution is governed by considerations of past contribution and future need.<sup>68</sup> In New Zealand,<sup>69</sup> equal sharing of family assets (which are strictly defined in the legislation) becomes an incident of divorce unless there are "extraordinary circumstances" or equal sharing would be "repugnant to justice".<sup>70</sup> Kovacs<sup>71</sup> expresses the view that, instead of being an incident of divorce, as is the case both in a system of discretionary adjustment of property interests and a system of deferred community of property, property rights would be better made an incident of the marital status.<sup>72</sup> To a certain extent, the problem has been recognised by the amendment to paragraph (ca) of the definition of "matrimonial cause" in s.4(1) of the Family Law Act, for this provides for the hearing of proceedings under s.78 and s.79 with respect to property of the parties "arising out of the marital relationship". However, equitable interests in property are still vulnerable until a ruling of the Family Court is obtained and the inchoate rights of one spouse to an ultimate share in property can be thwarted by the other spouse's disposition or dissipation of the property to which he or she holds legal title.

The problem of defining the property to be equally shared in systems of deferred community of property can prove to be as difficult as that of quantifying contributions under discretionary systems containing a compensation component (as in England and Australia).<sup>73</sup> Professor Kahn-Freund, a strong proponent of the introduction of community of property to England, put forward a classification which amply illustrates the problems inherent in any such attempt.<sup>74</sup> In the Unger Memorial lecture delivered at Birmingham University in 1971, he suggested "... making the purpose rather than the origin of assets the gist of the matter". According to this categorisation, household assets and property acquired through gift and inheritance would be "family" property while investments acquired through work or thrift would not.<sup>75</sup> For such "baffling conundrums"<sup>76</sup> as whether a painting is for aesthetic pleasure, which makes it a household asset, or for investment, there should be a retreat into presumptions. Freeman<sup>77</sup> points out, however, that "... presumptions have a knack of

fossilising out-of-date social assumptions", and if they are statutory, they are even more difficult to remove.<sup>78</sup> Ennor<sup>79</sup> expresses the view that legalistic presumptions force spouses to take a much more definitive stance as to the real ownership of property when it is acquired and they are consequently inimical to a harmonious family relationship and the interests of the family. Also, he argues, they may place a greater incentive on parties to attribute fault so far as breakdown of a marriage is concerned in an endeavour to achieve a more favourable economic position.<sup>80</sup>

The Law Commission rejected Kahn-Freund's thesis as impracticable<sup>81</sup> and Freeman<sup>82</sup> suggests that, however sociologically appropriate an emphasis on purpose might be, no test can be devised to resolve problems "... of a penumbral nature". Kahn-Freund himself almost admitted this when he said that "... (r)ules and presumptions ... may help in practice to define the difference between family assets and investment property. Yet the boundary will remain fluid and often invisible".<sup>83</sup> However, if the distinction cannot be made, he conceded that it will be necessary to fall back on judicial discretion, "... the rule of no principle".<sup>84</sup>

(g) The question of needs:

A distribution of property based solely on contributions made during the marriage may be completely unrelated to the needs of one or both parties to the marriage, particularly if he or she has the custody of the children of the marriage.

The "traditional" law of maintenance (or "alimony") performed one or more of three functions: to enforce support of the divorced wife who had been deprived by the divorce of the expectation of support inherent in the husband's marital obligations; to punish matrimonial fault by depriving the guilty spouse of her entitlement (or limiting it),<sup>85</sup> and to provide compensation to a wife for her contribution to the family. The modern approach confines maintenance to those in need of support by providing "transitional" support for those requiring time to become self-supporting after divorce; "custodial" support for those caring for children; and "support" insurance for older women who cannot reasonably be expected to support themselves.<sup>86</sup>

The "needs" perspective is incompatible with a simple division of the capital assets of the matrimonial "partnership". It has been necessary for the concept of "property" to be expanded to allow for the fact that the division of functions between spouses during the marriage and the allocation of child care responsibilities after its breakdown may produce disparities in the spouses' economic prospects. Recognition of the different economic effects of the contributions made by the spouses during the marriage and their respective needs afterwards frequently demands that there be an unequal division of their property at the end of the marriage, irrespective of legal title.

(h) The legal individuality of married persons:

The Married Women's Property Act 1882 (Eng.), as well as changing the substantive law, brought about an important procedural innovation by introducing a summary procedure whereby husband and wife, no longer one person before the law, were able to go before a court to have any property disputes between them determined. Such proceedings were quite independent of any divorce proceedings or any other matrimonial cause. In respect of a woman's contractual rights and the common law view that there should be inter-spousal immunity from actions in tort, the legislatures have since re-inforced the notion that a husband and a wife have a separate legal personality.

The power to contract in relation to the separate estate has been broadened to allow the wife to contract generally as if she were single.<sup>87</sup> The legal recognition of the economic freedom and legal individuality of a married woman allows her to contract with her husband in standard commercial transactions where the parties might just as well have been strangers; one spouse can convey property to the other; one can lend money to the other and bring an action to recover a debt due; one spouse can employ the other in his or her business and come under an obligation to pay wages; and the spouses can enter into business partnerships with each other.<sup>88</sup> While the wording of the New South Wales and Western Australian enactments suggests that a married woman's property, rather than the married woman herself, is responsible for her contractual debts,<sup>89</sup> s.7(1) of the Bankruptcy Act 1966 (Cth.) renders this

difference of no practical importance. In Tasmania and Western Australia it is provided that a married woman is contractually liable only where she acts "otherwise than as an agent".<sup>90</sup>

State Married Women's Property legislation is fairly guarded in its modification of the common law view that interspousal immunity from tort is one of the legal incidents of the relationship of marriage.<sup>91</sup> Victoria alone allows unqualified interspousal immunity in tort.<sup>92</sup> However, s.119 of the Family Law Act 1975 (Cth.) gives spouses the unqualified right to sue each other in tort, and through the operation of s.109 of the Constitution, which provides that, to the extent that it is inconsistent, State legislation is overridden by Commonwealth legislation, it is arguable that in any interspousal tort dispute the exclusive repository of jurisdiction is the Family Law Act.<sup>93</sup> However, Elliott J. in Madjeric<sup>94</sup> held that a tortious claim could be brought in the Family Court only if it was a matter otherwise within the Court's jurisdiction.

(i) The question of varied social values:

Just as marriage itself is a matter of infinite variation, so too is there infinite variety in social values,<sup>95</sup> particularly in a multi-cultural society such as ours.<sup>96</sup> Gibbs CJ. in Mallet v. Mallet<sup>97</sup> pointed out that it is

"... difficult, if not impossible, to say that any one set of values or ideas is commonly accepted, or approved by a majority of the members of society. Conflicting opinions continue to be strongly held as to the nature of marriage, the economic consequences of divorce and the effect, if any, that should be given to the fault or misconduct of a party when a court is making the financial adjustments that divorce entails".

There are sharp differences in attitudes from one cultural group to the next towards the position of women within marriage and the entitlements of spouses to property, both during marriage and at its end.

In order to deal humanely and justly with family dissolution and matters that relate to it,<sup>98</sup> it is necessary to acknowledge the cultural and ethnic diversity of contemporary Australia.<sup>99</sup>

(j) Alternatives to a system of separate property:

The considerations to be taken into account when devising a system of matrimonial property are clearly both complex and numerous.<sup>1</sup> The system should be fair to both spouses and third parties who deal with them, simple in form, and flexible enough to allow for variation. At the same time, it must give each spouse equal freedom to manage his or her own affairs and provide protection from the other spouse's profligacy, predatoriness or imprudence.

It has already been noted that the system of deferred community of property<sup>2</sup> that was adopted by New Zealand, Ontario and Saskatchewan,<sup>3</sup> despite its definition of the spouses' property rights at the time of marriage, postpones the equalisation of gains until the marriage is over, therefore perpetuating many of the disadvantages of the separate property regime during the currency of the marriage.<sup>4</sup> On the other hand, there are statutory restraints on the parties' ability to dispose of family assets (howsoever defined): certain transactions must be effected jointly and there are extensive injunctive powers in the courts to restrain transactions which are excessive or irresponsible, and penalties are imposed for fraudulent dealings which are proved to have been undertaken to defeat the other spouse's interest in the property.<sup>5</sup> The Australian Law Reform Commission, however, has expressed the view that it is possible to introduce protective provisions without going so far as to adopt a full community of property regime, for such a system is both complex and inflexible.<sup>6</sup>

A major disadvantage of a system which provides for the equalisation of assets on divorce is the question of the allocation of the debts of one of the parties.<sup>7</sup> The Australian Law Reform Commission in the Discussion Paper it issued in June, 1985, pointed out<sup>8</sup> a further disadvantage, namely that the equal division of assets does not lead to equality of outcome, for it fails to recognise what in modern society is probably the most valuable

asset that a person can have, namely the ability to generate income.<sup>9</sup> The statutory co-ownership scheme recommended by the English Law Commission represents its commitment to the principle of sharing major matrimonial assets throughout the marriage on a partnership basis<sup>10</sup> yet, as we have seen, it has its own disadvantages. Kovacs<sup>11</sup> is of the opinion that a liberalised traditional community<sup>12</sup> with co-management by both parties of all common property might provide the ultimate answer. In those jurisdictions with such a regime,<sup>13</sup> safeguards against dissipation of assets or their disposition by the spouse with title by gift or by will or by transfer for inadequate consideration are built into the system.<sup>14</sup> Such a system is still open to criticism on the grounds of complexity and inflexibility.

While the adoption of a community of property system was certainly considered,<sup>15</sup> the legislature in England in enacting the Matrimonial Proceedings and Property Act 1970 decided to retain the concept of separation of property. Provision was made for the exercise of judicial discretion within a framework of statutory guidelines.<sup>16</sup> The judge was given a discretion to solve such matters as provision for future need, the type of conduct which as a matter of principle ought to be taken into account, the scope of the property to be considered for division, and the emphasis to be placed on contributions, both direct and indirect. It may be seen, then, that the English legislature took the view that the complexities of modern life and the variability of its circumstances made it impossible to determine the allocation of property between the parties to a marriage according to strict legal rules which made no allowances for the facts and circumstances of a particular case. The provision of judicial discretion made possible "individualizing the application of the law".<sup>17</sup>

The power to exercise discretion in the allocation of property was retained under s.24 of the Matrimonial Causes Act 1973 (Eng.)<sup>18</sup> because the Law Commission<sup>19</sup> was of the opinion that

"... the justice done on divorce needs to be precise rather than broad and needs to take account of not only ... the individual spouses ... but of ... the children as well; and all the family assets have to be available for the exercise of the court's discretion".<sup>20</sup>

PART BTHE ENACTMENT OF THE FAMILY LAW ACT 1975 (CTH.)

The Family Law Act 1975 (Cth.) is based on the same model as the Matrimonial Causes Act 1973 (Eng.), developments in England and the recommendations of the various English Law Commissions having influenced the legislation ultimately adopted by the Federal Parliament.<sup>21</sup> According to the Full Court of the Family Court in Duff,<sup>22</sup>

"(T)he intention of the Act is to provide a code of sufficient scope and flexibility to bring, so far as possible, all the problems attendant upon family breakdown and dissolution of marriage under the jurisdiction of the Family Court of Australia".<sup>23</sup>

Gibbs J., as he then was, described the discretion conferred on the Family Court of Australia to make orders concerning the adjustment of property rights as

"... extraordinarily wide. Such orders may of course disturb existing rights; few curial orders can have a greater effect on ordinary citizens of modest means".<sup>24</sup>

Nevertheless, the discretion of the Court is by no means uncontrolled, since specific statutory guidelines are laid down in s.79(4), which, by operation of s.79(4)(e), incorporates s.75(2). The weight to be attached to each or any of the guidelines and factors in any case will depend on the individual fact situation and the judge's evaluation of it.<sup>25</sup>

A major criticism of a discretionary jurisdiction is the unpredictability of the result, for it is rarely possible to forecast with any certainty what the shares in property as between the spouses will be on divorce. However, in the light of the analysis made in the previous section of this chapter, it is submitted that the operation of judicial discretion leads to a fairer result in the majority of instances since a judge is free to take into account

the particular circumstances of the case before the Court.<sup>26</sup>

Support for this attitude towards the system of property distribution established by the Family Law Act is provided by the fact that, in the Discussion Paper it issued in June, 1985, the Australian Law Reform Commission expressed in principle satisfaction with the present system.<sup>27</sup> The majority of respondents in the Commission's survey of family property cases in Australia preferred the retention of a discretionary system, principally because of the perceived importance of the needs of the custodial parent and children.<sup>28</sup>

It will be the purpose of the remainder of this study to first examine the constitutional basis of the Family Law Act 1975 and its structure in relation to property distribution. Whether the Act's scope is wide enough and its provisions are flexible enough to provide a remedy for a spouse who has been disadvantaged by the financial misconduct of the other spouse will be discussed in the final chapters.



## CHAPTER FOUR

### THE EXTENT OF THE COMMONWEALTH PARLIAMENT'S POWER TO LEGISLATE WITH RESPECT TO MATRIMONIAL PROPERTY MATTERS.

#### INTRODUCTION:

The fact that the Commonwealth Parliament's powers to legislate with respect to matters which are compendiously called "family law" are limited places significant restraints on the Family Court of Australia's jurisdiction to determine disputes over property matters between the parties to a marriage.

The Family Law Act 1975, as initially enacted, purported to give the Family Court jurisdiction to deal with all property relationships of the parties to a marriage, but the High Court in Russell v. Russell: Farrelly v. Farrelly<sup>1</sup> limited the jurisdiction to proceedings ancillary to principal relief. A dual jurisdiction between the Commonwealth and the States in matrimonial property law arose as a result.

It has already been indicated that, with the exception of proceedings which fall under the terms of s.161 of the Marriage Act 1958 (Vic.) and s.30 of the Family Court Act 1975 (W.A.), which was enacted as a result of the decision in Russell: Farrelly,<sup>2</sup> State Courts must determine property disputes according to the general rules of law and equity. The Family Court, on the other hand, has a discretionary jurisdiction to adjust property interests in cases which fall to be decided under s.79.

A further attempt to extend the Family Court's jurisdiction with respect to property matters was made with the enactment of the Family Law Amendment Act 1983 (Cth.). The constitutionality of the amendment to the definition of "matrimonial cause" by paragraph (ca)(i) of s.4(1) has not as yet been established, however. Moreover, no suggestions as to the limits of the paragraph have yet been made by the Full Court of the Family Court.

Another complication is added by the fact that the exact relationship of the Family Law Act to s.109 of the Constitution,

which provides that all State laws inconsistent with federal laws shall be deemed invalid, has not yet been laid down by the High Court.

That the constitutional bases and the interpretation of laws with respect to matrimonial property remain undecided bodes ill for the spouse who would prefer to take proceedings under the Family Law Act because of the advantages offered by its provisions. Moreover, Wade<sup>3</sup> suggests that relations between the Family Court and the common law jurisdictions are strained and that

"... proceedings under the Family Law Act will persist under the shadow that the Supreme Court may not agree with the Family Court's conclusion concerning the ownership of property as between the two married parties and other third persons".

Since the principle of stare decisis does not apply as between the Family Court and the State Supreme Courts except to the extent that the Family Court has an accrued jurisdiction to decide non-federal matters,<sup>4</sup> the problems presented by a dual property jurisdiction are formidable.

#### PART A:

#### THE CONSTITUTIONAL BASIS.

When the Australian Constitution<sup>5</sup> was enacted in 1901, it vested in the newly formed Australian Commonwealth power under s.51 to make laws with respect to thirty nine subject matters.<sup>6</sup> Of these, placetum (xxi) and (xxii) respectively conferred power on the Commonwealth with regard to "marriage"<sup>7</sup> and "divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants".<sup>8</sup> Placetum (xxxix) confers an incidental power to make legislation in "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth or in the Federal Judicature, or in any department or officer of the Commonwealth".<sup>9</sup>

At the time of the Constitution's enactment, family disputes were seen as posing problems essentially of a legal nature requiring legal remedies. It should be kept in mind, however, that the marital relationship is not one which by any means can be constituted or regulated exclusively by a bundle of legally enforceable rights and duties. In respect of many aspects of the relationship, as Atkin L.J. observed in Balfour v. Balfour,<sup>10</sup>

"Each house is a domain into which the King's writ does not seek to run, and which his officers do not seek to be admitted."

That the marital relationship raises complex social and behavioural problems, the solutions to which lie in sociology and the behavioural sciences as well as in the law, was not perceived in 1901. A perusal of Quick and Garran's exposition on marriage in their Annotated Constitution of the Commonwealth of Australia (1901) shows that "... (f)amily relationships were ... viewed from the perspective of rights and duties."<sup>11</sup> Problems, on this view, involved the infringement of such rights and the dereliction of such duties. As such they were susceptible of solution by legal actions".<sup>12</sup>

Not surprisingly, the drafters of the Constitution provided legislative powers far short of those required to cover the entire scope of subjects which are known in the 1980's to comprise "family law".<sup>13</sup> Moreover, the powers which were conferred by the Constitution have been interpreted in a legalistic manner,<sup>14</sup> the High Court generally seeing itself as being bound by the terms of the Constitution. However, the attitude of members of the High Court towards the extent of federal powers has varied. Different compositions of the High Court have interpreted s.51(xxi) and (xxii) with both generosity<sup>15</sup> and restraint.<sup>16</sup> Frequently in the mid-1970's, the period when the Family Law Act 1975 (Cth.) was debated and enacted, the High Court insisted that its role was that of guardian of the Constitution.<sup>17</sup> As Griffith CJ. so aptly put it as early as 1908 in the Union Label Case:<sup>18</sup>

"Parliament cannot enlarge its powers by calling a matter with which it is not competent to deal by

the name of something else which is within its competence ... (and) it is for the (High) Court to determine ... whether an asserted power is or is not conferred by the Constitution."

A fragmentary approach to the interpretation of the Commonwealth's power to legislate with respect to the family is inevitable "... in the absence of the conferral of a plenary power identified as such and capable of being delimited by reference to a full range of rights, duties and legal relationships answering the description of 'family law'".<sup>19</sup> That the Commonwealth has, in fact, no power with respect to family law was pointed out by Barwick CJ. and Stephen J. in Vitzdamm-Jones v. Vitzdamm-Jones; St Clair v. Nicholson and Others.<sup>20</sup> Further, the lack of Federal interest in the area is highlighted by the fact that the marriage and divorce powers conferred by the Constitution in 1901 were not used to any significant extent<sup>24</sup> for some sixty years until the Matrimonial Causes Act 1959 (Cth.) and the Marriage Act 1961 (Cth.) were enacted.

On the other hand, it must be pointed out that the two matters, "marriage" and "matrimonial causes", on which the Commonwealth may legislate are not discrete and that it is not necessary that a given topic fall directly within one or the other, but not both, of the heads of power. It is well recognised that a law may be characterised as a law with respect to more than one subject matter.<sup>22</sup> Therefore, a law may be a law with respect to both marriage and matrimonial causes. For example, Taylor J. and Menzies J. in the Marriage Act Case<sup>23</sup> laid to rest the narrow view that if placetum (xxii) had not been included in s.51 of the Constitution, there would have been no power to make laws providing for divorce. As they pointed out, divorce may be regarded as being a particular aspect of marriage.<sup>24</sup> Also, through the operation of the so-called "implied incidental power",<sup>25</sup> an existing Commonwealth power may be used in the furtherance of a family law objective, even though it may not be characterised as being a topic of "family law" per se.

The implied incidental power or "associated jurisdiction"<sup>26</sup> is not a separate head of power, but rather a rule of construction whereby every grant of power is interpreted to include such ancillary powers (and only such powers) as are reasonably necessary to

effectuate the purpose of the main power.<sup>27</sup> Its operation is well-illustrated by a trilogy of recent High Court decisions comprising Philip Morris Inc. v. Adam P. Brown Male Fashions (The Philip Morris Case);<sup>28</sup> Fencott v. Muller<sup>29</sup> and Stack v. Gold Coast Securities (No.9) Pty. Ltd.<sup>30</sup> (the Trade Practices Cases).

These cases considered the extent of the jurisdiction of the Federal Court of Australia under the Trade Practices Act 1974 and, in particular, under s.86 of that Act. Section 86 provides that:

"Jurisdiction is conferred on the (Federal) Court to hear and determine actions, prosecutions and other proceedings under (Part VI of the Trade Practices Act) and that jurisdiction is exclusive of the jurisdiction of any other court, other than the jurisdiction of the High Court under Section 75 of the Constitution".

The High Court held that s.86 is a law defining the jurisdiction of the Federal Court with respect to matters arising under a law made by the Parliament pursuant to the power conferred by s.76(ii) and s.77(i) and (ii) of the Constitution<sup>31</sup> and that the jurisdiction conferred with respect to matters arising under Part VI of the Trade Practices Act extends to the determination of questions or issues which, though they do not arise under Part VI, are part of the matter which so arises.<sup>32</sup> This so-called "associated jurisdiction" was held to arise from the operation of s.32(1) of the Federal Court of Australia Act 1976 (Cth.) which "to the extent the Constitution permits" confers jurisdiction on the Court "in respect of matters not otherwise within the jurisdiction expressed by this Act or any law to be conferred on the Court that are associated with matters ... in which the jurisdiction of the Court is invoked or that arise in proceedings (including proceedings upon an appeal before the Court)". Section 32(1) has been held to give the Federal Court jurisdiction only in associated matters which arise under other laws made by the Parliament, even though the Parliament has not otherwise conferred jurisdiction on the Court in respect of those matters.<sup>33</sup>

Section 33 of the Family Law Act is expressed in identical terms<sup>34</sup> and, since the High Court decision in Re Ross-Jones and

and Marinovich; ex parte Green,<sup>35</sup> it is apparent that decisions concerning s.32 of the Federal Court of Australia Act 1976 will assist in interpreting s.33 of the Family Law Act.<sup>36</sup>

In Philip Morris,<sup>37</sup> their Honours were invited to extend the jurisdiction of the Federal Court to deal with common law claims arising under State law made in conjunction with claims arising under the Trade Practices Act 1974 in pursuance of s.32(1) of the Federal Court of Australia Act 1976, but, with the exception of Murphy J., they declined to do so. As pointed out by the High Court in Re Ross-Jones and Marinovich; ex parte Green, which discussed the application of s.33 of the Family Law Act,<sup>39</sup> the associated jurisdiction can arise only if the Court already has jurisdiction: its jurisdiction may then be extended, as far as is constitutionally permissible, to associated matters.<sup>40</sup>

The majority of the Justices in Philip Morris<sup>41</sup> held that "matter" and "matters" in s.76(ii) and s.77(i) respectively of the Constitution empowered the Commonwealth Parliament to invest jurisdiction in the Federal Court of Australia to determine other matters provided that those matters were not severable from a matter which was originally, and not merely derivatively, within s.76(ii). Mason J's test, namely that the attached claim and the federal claim must "... so depend on common transactions and facts that they arise out of a common substratum of facts",<sup>42</sup> was accepted by the majority of the High Court, Mason, Murphy, Brennan and Deane JJ., in Fencott v. Muller.<sup>43</sup> Therefore, using the language of the Granall Case,<sup>44</sup> the inclusion of non-severable matters reasonably necessary for the efficacy of the jurisdiction over the matter originally within the constitutional provision is not beyond the jurisdiction of a court vested with federal jurisdiction. The majority of the High Court in Fencott v. Muller<sup>45</sup> explained this so-called "accrued" jurisdiction in the following terms:

"What is and what is not part of the one controversy depends on what the parties have done, the relationship between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings

which a party may institute, but may be illuminated by the conduct of those proceedings and particularly by the pleadings in which the issues in controversy are defined and the claims for relief are set out. But in the end, it is a matter of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter".

In Gubbay,<sup>46</sup> Nygh J. applied the High Court's interpretation of s.32 of the Federal Court of Australia Act 1976 to the terms of s.33 of the Family Law Act 1975 and he held that it must be read as being confined to giving the Family Court an associated jurisdiction in respect of matters arising under the Federal Acts other than the Family Law Act, naming as examples the Bankruptcy Act 1966, the Copyright Act 1912 and the Trade Practices Act 1974. Since the claim in the case before him, namely an application for damages for breach of trust, arose under the general law of equity, a matter which arises under State law rather than under a federal Act, his Honour was of the view that it lay outside the scope of s.33 and that the Court did not have jurisdiction to decide it.<sup>47</sup> His Honour also outlined<sup>48</sup> the distinction between the "associated jurisdiction" of the Family Court and its "accrued jurisdiction".<sup>49</sup> By the latter is meant a jurisdiction to provide a remedy for claims arising under State law which arise in conjunction with or are non-severable from a claim arising under s.79 of the Family Law Act. An example might well be a claim for property adjustment with associated claims for damages arising out of a breach of contract or a tortious act between the parties to the marriage.<sup>50</sup>

Barwick C.J. in Philip Morris<sup>51</sup> said in respect of a claim under the Trade Practices Act 1974 (Commonwealth) that "... the authority to grant appropriate remedies will be included in the accrued jurisdiction."<sup>52</sup> While there is no provision in the Family Law Act 1975 corresponding to s.22 of the Federal Court of Australia Act, which confers on the Federal Court a power to grant remedies to which any of the parties to a dispute appears "to be entitled in respect of a legal or equitable claim properly brought before it so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and

all multiplicity of proceedings concerning any of those matters avoided", Evatt C.J. in Smith (No.2)<sup>53</sup> expressed the view that the Family Court also has an accrued jurisdiction to grant appropriate remedies in a case before it should it decide to exercise it.<sup>54</sup> Her Honour based her opinion on the fact that s.34(1) of the Family Law Act, which gives the Family Court, in relation to matters in which it has jurisdiction, power to make such orders and issue such writs as it thinks fit, is expressed in almost identical terms to s.23 of the Federal Court of Australia Act. While she conceded that the provisions of s.34 are less broad and less general in nature than sections 22 and 23 of the Federal Court Act, when considered in conjunction with s.80 and s.81 of the Family Law Act, it seems clear that they have a corresponding purpose when the Family Court is exercising its powers under Part VIII of the Family Law Act, which concerns proceedings with respect to property and maintenance.

Section 80(k) of the Family Law Act empowers the Court to make any order which it thinks is necessary to do justice in proceedings under Part VIII while s.81 directs the Court in proceedings under that Part, so far as practicable, to make such orders as will finally determine the financial relationships between the parties and avoid further proceedings between them.

It appears, then, that so long as there is a common nucleus of facts and circumstances in the evidence raised before the Family Court, the Court has the discretion to assume an accrued jurisdiction and decide both the federal and the non-federal aspects of the proceedings, therefore obviating the need in such cases for the applicant to apply to a State Supreme Court for orders relating to matters of the general law. The parties, the remedies and the elements of the differing causes of action decided under the accrued jurisdiction need not be the same.<sup>55</sup> In an appropriate case, then, the Family Court may be asked to exercise jurisdiction under the De Facto Relationships Act 1984 (N.S.W.) and determine a property dispute concerning a husband and wife and the de facto spouse of one of them.

While the Family Court has exclusive jurisdiction over a "matrimonial cause" (s.8 of the Family Law Act), a non-federal action which arises "non-severably" with a matrimonial cause and



therefore falls within the accrued jurisdiction of the Family Court does not fall within its exclusive jurisdiction. Therefore, the non-federal claim could be brought before a State Supreme Court at the same time as it was being adjudicated in the Family Court in conjunction with property proceedings under s.79. Jurisdictional conflict appears to be inevitable, but in the past, Family Court Judges have adjourned or continued proceedings according to considerations of delay and/or legal costs.

The burgeoning of the Family Court's accrued and associated jurisdiction through extrapolation from the decisions of the High Court in the "Trade Practices Cases" has widened its reach over property matters concerning married persons. Wade<sup>56</sup> claims that it is arguable that, in appropriate cases, the Family Court can now decide such actions as a claim by a relative to a share of property already in dispute between spouses under s.79 of the Family Law Act, whether that claim be under the law of trusts, gifts or contracts; a claim by a relative to a monetary sum under personal actions such as debt, quantum meruit or proprietary estoppel; a claim by a de facto spouse to a share of property under the De Facto Relationships Act 1984 (N.S.W.); and a request for the appointment of a receiver to wind up a partnership under State Partnership legislation. In appropriate cases, the Family Court might also be able to decide issues concerning a deceased person's estate and the operation of State Testator's Family Maintenance legislation.

Obviously, in future, there is potential for jurisdictional tension between the Family Court and State Supreme Courts which may not be easily decided through judicial comity.

For the High Court, the Commonwealth Parliament's control of the institution of marriage extends to its regulation of the rights and duties between husband and wife, or more specifically, such inter-personal rights as consortium or, more widely, inter-spousal relations, whether these relations give rise to personal rights and duties (such as consortium) or proprietary rights and duties (such as maintenance or settlement of property).<sup>57</sup> Section 51(xxi) (the "marriage power") supports "any law with respect to marriage considered as an institution ... (such as) laws defining and

regulating the respective rights duties and obligations of the parties inter se".<sup>58</sup> Federal marriage legislation can "... extend at least to the personal relationships that are the consequences of marriage - cohabitation, conjugal society, all that is meant by consortium, the mutual society, help and comfort that the one ought to have for the other. These are of the very nature of marriage".<sup>59</sup>

It will be noted that the latter view of s.51(xxi) gives it a further reach over inter-personal relations, namely beyond the area of personal relationships into the area of proprietary interests related to the institution of marriage.<sup>60</sup> According to Mason J. in Russell: Farrelly,<sup>61</sup> the marriage power "... may be exercised by the providing for and the enforcement of rights of maintenance ... and property" provided these are "... rights duties and obligations of the parties arising out of or in consequence of marriage".<sup>62</sup> Therefore, "... (e)ven if in law or equity the title to property is in one party to a marriage, the circumstances of the marital relationship may make an alteration of parties' interests just and equitable. In the case of the parties to a marriage, the marriage relationship brings (s.79) within the marriage power ... (but these proprietary rights must be) proprietary rights ... (related) to the marriage relationship".<sup>63</sup>

The limiting of proprietary rights to those "... arising out of or in consequence of marriage" or to proprietary rights "... related to the marriage relationship"<sup>64</sup> illustrates the circumscribed power over property matters conferred by the "marriage power". It is not sufficient for a law founded on the terms of s.51(xxi) to deal with proprietary interests even if these happen to be contested between husband and wife, since the Federal Parliament has no power over a husband and wife, only a power over marriage and, in relation thereto, a husband and wife. Rather it is necessary for the s.51(xxi) law to deal with proprietary interests which are affected by the marriage relationship. Therefore, it would be intra vires for the Parliament to enact a law concerning proprietary interests in a home to which one party holds the legal title, but to whose acquisition and improvement the other has contributed, even if only indirectly in the capacity of homemaker or parent. In such a case, the enactment would be dealing with

marriage-partnership property. As Barwick C.J. briefly put it, the s.51(xxi) law is limited to interspousal disputes about "... property the right or claim to which arises out of marriage".<sup>65</sup>

It should also be noted that although the Family Court of Australia is a superior court of record, it does not have a general inherent injunctive jurisdiction; where there is no marriage interest in the property (and no matrimonial cause on foot or about to be set in motion) the Family Court has no jurisdiction over such property. This is so because the constitutional powers underlying the jurisdiction of the Family Court of Australia comprise s.77(i) with s.75(ii) and s.51(xxi) plus incidental powers,<sup>66</sup> and the Family Court's jurisdiction is circumscribed by these.

As far as the term "matrimonial cause" is concerned, the meaning remains fixed as the term was construed in 1901, but its denotation or the scope of its application will change according to changing conditions.<sup>67</sup> As Menzies J. expressed it in Lansell v. Lansell:<sup>68</sup>

"It is right, in construing a grant of power, to ascertain as a starting point at least what the words used in the Constitution meant in 1901 when the Constitution was enacted, but it is quite another thing to attempt to confine the legislative power of the Parliament to making the kinds of laws then in existence".

Therefore, one should look for the "... outside limits" rather than the "... minimum content" of a constitutional power.<sup>69</sup>

It has been said that a "cause" is a causa jurisdictionis, any suit, action, matter or other similar proceeding competently brought before and litigated in a particular court.<sup>70</sup> "Matter" has been held not to mean "legal proceeding", but rather the subject matter for determination in a legal proceeding. As Mason J. described the term in the Philip Morris case,<sup>71</sup> "matters" is "... the widest term to denote controversies which might come before a Court of Justice",<sup>72</sup> but he went on to say<sup>73</sup> that there

can be no jurisdiction except in a "... matter of the required kind". Elliott J. in Madjeric<sup>74</sup> put the notion clearly when he said the "... jurisdiction identifies or limits the subject matter with which the Court is authorised to deal".<sup>75</sup>

Under the Judiciary Act 1903 (Commonwealth), s.2, "cause" includes any suit, and any suit includes any "action or original proceeding between parties". Therefore, a "matrimonial cause" in this sense must refer to a legal proceeding arising out of or concerning a matrimonial relationship.<sup>76</sup> However, the same dispute may be seen as a "matrimonial cause" by the Family Court but be characterised differently in the Supreme Court. For example, a dispute between husband and wife in respect of assets held in partnership could equally well be maintained in both jurisdictions. If the Family Court heard the case, one party might well be awarded a greater share of such assets because of a greater degree of contribution, whereas, if the Supreme Court heard the application, the assets would be divided equally, since the application would not be regarded as a matrimonial cause.<sup>77</sup>

Whether or not a matrimonial cause is competently brought before the court will depend whether the matter concerned in the proceedings is justiciable,<sup>78</sup> that is, whether a law creating rights and duties can be invoked by the parties to a controversy and form a basis upon which the Court will adjudicate. It appears, then, that the Parliament is competent to make a law involving any controversy arising out of or incidental to marriage that is capable of being litigated so long as it has as its minimum content the kind of subject matters which in 1901 were regarded as being included within the concept of "matrimonial cause", but it may also encompass matters which properly can be regarded as relevant to those subject matters as being within "... the widening denotation in the light of changing social conditions".<sup>79</sup>

The definition of "matrimonial cause" in the Matrimonial Causes Act 1959 (Commonwealth) fell short of the possible coverage that was available to the Commonwealth under s.51(xxi) of the Constitution.<sup>80</sup> Therefore, matters such as maintenance of wives and children and custody of children (other than in connection with divorce or other "principal proceedings") as well as the

guardianship of children did not come within the terms of the Act.

On the other hand, since State Supreme Courts were invested with Federal jurisdiction, the problem of dual court systems was avoided.<sup>81</sup> In matters with respect to property, jurisdiction was assumed under the federal law where the proceedings were in relation to proceedings for federal relief, but it remained in the State courts where this was not the case. Where a matrimonial cause for principal relief had come into existence but had not been disposed of prior to the litigation of a property dispute under s.86(1), however, there was doubt as to whether the Commonwealth legislation could deal with matrimonial property matters.<sup>82</sup>

Lansell v. Lansell<sup>83</sup> raised the issue as to whether there was power to order settlements of matrimonial property under the matrimonial causes power, and whether s.86(1)<sup>84</sup> of the Matrimonial Causes Act 1959, which purportedly conferred such a power, was valid, and, if so, to what extent. The parties had been married but their marriage had been dissolved some fourteen years before the proceedings in question, in which the Court considered the wife's application for an order directing the husband to execute a registrable transfer of certain land of which he was registered proprietor to the wife for life with the remainder to their two children. The High Court held that, by its terms, the Matrimonial Causes Act applied to such proceedings. Kitto J. pointed out that both property and maintenance proceedings were "relief incidental to, because consequential upon the dissolution of a marriage or the granting of one or the other forms of relief which identify a cause as a matrimonial cause in the ordinary English sense of the expression"<sup>85</sup> In Sanders v. Sanders,<sup>86</sup> the High Court took the view that maintenance and property are very closely inter-linked, overlapping rather than being mutually exclusive. Therefore, it was held that the property of one party could be settled upon the other in order to provide maintenance for that other party,<sup>87</sup> thereby conferring a broad discretionary power to vary the established proprietary rights of husband and wife in matrimonial proceedings.

The approach adopted opened the way for the Commonwealth to legislate boldly in the area of matrimonial property.<sup>88</sup>

PART BJURISDICTION UNDER THE FAMILY LAW ACT TO MAKE ORDERS AFFECTING  
PROPERTY(a) BEFORE THE ENACTMENT OF THE FAMILY LAW AMENDMENT ACT 1983

When the Family Law Act 1975 was enacted, it appeared that a robust approach had indeed been adopted. The Act conferred on the Family Court, by s.31(1) and s.39(1), jurisdiction to entertain matrimonial causes, subject to some qualifications.<sup>89</sup> According to the original definition in s.4(1) of the Act, "matrimonial cause", inter alia, meant proceedings with respect to

- (i) the maintenance of one of the parties to a marriage;
- (ii) the property of the parties to a marriage or of either of them; or
- (iii) the custody, guardianship or maintenance of, or access to, a child of marriage".

Therefore, power was assumed to deal with the property of the parties to the marriage, whereas under the Matrimonial Causes Act 1959 proceedings for a settlement were defined as being a matrimonial cause only if they were in relation to concurrent, pending or completed proceedings for principal relief.<sup>90</sup> Moreover, under s.78, the Court was invested with power to make declarations of interest in the property of the parties, and under s.79, it could alter the parties' interest in the property where it considered it just to do so. While the provisions did not go so far as to create a regime of matrimonial property involving property rights and liabilities arising as an incident of marriage, the way seemed open for the Court to deal with the property relationships of the parties to a marriage even in the absence of any proceedings, antecedent or concurrent, for principal relief, such as divorce or nullity.

However, in Russell: Farrelly,<sup>91</sup> which was decided in May, 1976, only shortly after the Family Law Act 1975 came into operation,<sup>92</sup> unlimited property jurisdiction not ancillary to principal relief

was held by a majority of the High Court to be beyond federal constitutional power,<sup>93</sup> and Parliament was quick to amend certain parts of the Act to reflect their conclusions.<sup>94</sup>

Mason J.'s views in Russell: Farrelly<sup>95</sup> in fact became the order of the High Court. His interpretation of the scope of constitutional power to legislate in respect of property proceedings between the parties to a marriage was summarised by the Full Court of the Family Court of Australia in Tansell v. Tansell<sup>96</sup> in the following terms:

"In his view proceedings with respect to the property of the parties to a marriage or either of them (para. c(ii) of the original definition of matrimonial cause) could not be considered as an independent matrimonial cause within the meaning of sec. 51(xxi) of the Constitution. The primary reason was that such proceedings were not limited to proceedings between the parties to the marriage in question. His Honour declined to read the provision down by reference to the marriage power (i.e. by limiting it to proceedings between the parties) because the proceedings would then be a separate matrimonial cause, independent of any application for principal relief, in which the Court could deal with any property of the parties howsoever and whensoever acquired. In the result his Honour held that the provision could be read only by reference to Sec.51(xxii) of the Constitution as conferring jurisdiction to grant ancillary relief in proceedings for annulment or dissolution of marriage ...".

Accordingly, there was a division of jurisdiction between the Commonwealth and the States in the area of matrimonial property law.<sup>97</sup> Until divorce proceedings could be commenced between the couple, namely after the effluxion of the twelve month separation period required by s.48(2) of the Act as evidence of the irretrievable breakdown of the marriage, disputes as between husband and wife concerning their property remained within the province of State

legislation and the jurisdiction of State Courts unless the parties could claim accelerated relief by making an application for a declaration as to validity of a marriage, divorce or annulment (s.113 and s.4(1)(b)) or a decree of nullity of marriage (s.51 and s.4(1)(a)(ii)), although such instances would be rare,<sup>98</sup> the grounds for a nullity decree being particularly restricted.<sup>99</sup> Where a marriage has been a foreign one, questions as to its validity in Australia raise some doubt, so that the acceleration of relief will be more readily available in such cases.<sup>1</sup>

Once proceedings for principal relief are commenced, any property dispute between a husband and wife becomes subject to federal legislation in the form of the Family Law Act 1975 and, except in Western Australia, subject to the jurisdiction of the Family Court of Australia. In Western Australia, according to the terms of s.29 and s.30 of the Family Court Act 1975-1982 (W.A.),<sup>2</sup> the Family Court of Western Australia administers both federal and non-federal laws, and the adjustive property jurisdiction is available in both systems.<sup>3</sup>

Account could be taken of the indirect non-financial contribution to the acquisition, conservation or improvement of property made by a wife in her capacity of homemaker and mother once principal proceedings could be taken under the Family Law Act. By contrast, except such cases as fell within the terms of s.161 of the Marriage Act 1958 (Vic.) or s.30 of the Family Court Act 1975-1982 (W.A.), disputes as to property falling under State legislation had to be decided under the strict rules of law and equity whereby it is not possible to take into account non-financial contribution by a wife to the acquisition of the family assets. According to the terms of s.48(2) of the Family Law Act, proceedings for dissolution of marriage can only be taken and a decree of dissolution of marriage be made "if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months preceding the date of the filing of the application for dissolution of marriage". Therefore, in the majority of States, a husband could have up to twelve months after separation from his wife to dispose of property to which he held the legal title,<sup>4</sup> but to the acquisition of which his wife may have indirectly contributed,



either through indirect financial contributions<sup>5</sup> or through her activities as homemaker or parent.<sup>6</sup>

A majority of the Full Court in Sieling<sup>7</sup> stated obiter<sup>8</sup> that despite precedents to the contrary, an injunction could lie to prevent the husband from dealing with assets prior to the availability of proceedings for principal relief. In granting such relief, the Court would be exercising jurisdiction to deal with a present matrimonial cause under s.4(1) and s.114(1). The jurisdiction to make a "freezing order" depended on the equities in property that the parties had built up during the marriage. Once a marriage had broken down, this approach enabled a court to grant an injunction to protect the incipient or inchoate rights of a spouse to seek an order altering property interests under s.79 of the Act, but such an injunction had to be "temporary and personal".<sup>9</sup>

The Sieling injunction to freeze dealings with property pending the availability of the property jurisdiction was adopted by a number of single judges<sup>10</sup> and, despite some initial reluctance to create jurisdictional conflicts between the two court systems,<sup>11</sup> it was utilized to prevent a party from disposing of property by applying for inconsistent Supreme Court orders.<sup>12</sup> The Full Court first employed this mode of closing the hiatus in Family Court jurisdiction pending the availability of principal relief in Stowe,<sup>13</sup> in which the Court set down the criteria which a party seeking a Sieling injunction needed to establish, and Buckeridge (No.2).<sup>14</sup>

However, the requirements set down in Stowe<sup>15</sup> do not extend jurisdiction to the Family Court where no s.79 order will ultimately be available,<sup>16</sup> as for example where the other party to the marriage has died,<sup>17</sup> unless property proceedings have already been instituted,<sup>18</sup> or where all the property of the parties is charged to a mortgage or a secured creditor so that there is no equity in the property remaining in the parties in respect to which a s.79 order may be made.<sup>19</sup> Alternatively, the Court may find it has jurisdiction, yet choose as a matter of discretion to grant an injunction on the grounds that it does not believe the property to be at risk<sup>20</sup> or because the balance of convenience lies in withholding

the injunction.<sup>21</sup> Technically, if the Family Court regards itself as having jurisdiction but for some reason declines to exercise it, then the Supreme Court has no jurisdiction in the matter and the applicant has no remedy.<sup>22</sup> In practice, however, it is nevertheless regarded as proper that the Supreme Court should entertain an application subsequent to its refusal in the Family Court.

In that a Sieling injunction<sup>23</sup> must be limited in duration and personal and its award is a matter for the discretion of the Court, it does not provide complete protection for a non-titled spouse, who may be considerably disadvantaged by the freedom of the other spouse to dispose of property or dissipate assets in the period pending principal proceedings.

The divided property jurisdiction has involved many spouses in the cost, emotional trauma and inconvenience associated with separate proceedings in the Family Courts of Australia and in State and Territory Supreme Courts or Magistrates' Courts. Prior to the Family Law Amendment Act 1983, the division often forced spouses to institute proceedings for dissolution of marriage in order to obtain a property settlement under the Act, or it caused the duplication of proceedings by making it necessary for parties to either approach the Family Court for interim or temporary relief until such time as the ground for principal relief became available or to take separate proceedings in a State or Territory Court. This resulted in substantially increased legal costs to the parties (or, in the case of legally-aided parties, to the Government, and therefore to the community as a whole) and a significant disadvantage to women, as the wife is often in a vulnerable position in relation to property if her marriage breaks down.<sup>24</sup> Finlay<sup>25</sup> adds a further disadvantage of the divided jurisdiction, namely manouevering and the use of subterfuge as the parties attempted to get themselves within a particular jurisdiction not otherwise open to them.

The Joint Select Committee in its inquiry into the Family Law Act 1975<sup>26</sup> considered a number of solutions to the problems of the divided jurisdiction,<sup>27</sup> including the possibility of introducing a matrimonial property regime pursuant to the "marriage power" (s.51(xxi) of the Constitution). It was of the opinion that,

preparatory to the introduction of any such regime, there should be a survey to establish community attitudes to the proposal, that a full study of the legal implications of introduction of such a scheme should be carried out by the Law Reform Commission and that an assessment of the experience under the New Zealand and the various Canadian schemes should be made.<sup>28</sup> In the interim the Committee urged that there be immediate amendments to the Family Law Act.<sup>29</sup>

In their submission to the Joint Select Committee, the Judges of the Family Court of Australia had expressed the view that an analysis of the reasons given by the majority of the High Court in Russell: Farrelly, and in particular the judgement of Mason J.,<sup>30</sup> suggested that there was a power to legislate in respect of property which has been acquired for or is used for the purposes of the marriage.<sup>31</sup> Mason J.<sup>32</sup> had explained the "marriage power" in the following terms:

"... Notwithstanding the existence of (the divorce power), the marriage power enables the Parliament to provide for the enforcement of such rights, duties and obligations as may be created in exercise of the marriage power ... So understood, the power may be exercised by providing for the enforcement of rights of maintenance, custody and property by proceedings separate and independent of proceedings for annulment or dissolution of marriage".

Applying this interpretation of the marriage power, Mason J. was able to uphold as intra vires the jurisdiction conferred by the Family Law Act to determine proceedings relating to children and maintenance proceedings between spouses, independently of divorce or other proceedings for principal relief (subject to the limitation that such proceedings must only be between parties to a marriage). However, because the Act did not limit the property that might be the subject of proceedings to property in some way incidental or related to the fact of marriage, the attempt to confer jurisdiction on such property proceedings could not be said, according to Mason J., to be an exercise of the "marriage power". Rather, it had to be regarded as exercise of the "divorce power". Therefore such property

proceedings had to be ancillary to proceedings for principal relief, and accordingly limited to the parties to the marriage.

(b) AS A RESULT OF THE ENACTMENT OF THE FAMILY LAW AMENDMENT ACT 1983<sup>33</sup>

The Joint Select Committee in its Report on the Family Law Act<sup>34</sup> recommended that the Act be amended by relating the jurisdiction in respect of matrimonial property disputes to the marriage power. It was of the view that if the property jurisdiction were limited to require that:

- (i) the proceedings be between the parties to the marriage;
- (ii) the dispute be related to the property or the property claims of either party; and
- (iii) the claim arise out of the fact that the parties are married,

the legislation would survive testing of its validity in the High Court.

By the Family Law Amendment Act, which eventually was given Royal Assent on 1st November, 1983, and which came into effect on 25th November, 1983, the definition of "matrimonial cause" in s.4(1) was amended by revision of paragraph (ca), which originally had been inserted as a result of the decision in Russell: Farrelly<sup>35</sup> regarding the limits which should be placed on the operation of s.79. As amended in 1983, paragraph (ca) expanded the powers over matrimonial property disputes of Courts exercising jurisdiction under the Family Law Act 1975 in order to enable them to deal with proceedings between the parties to a marriage with respect to the property of either or both of them, being "proceedings arising out of the marital relationship".<sup>36</sup>

The decision of the High Court in Cormick and Cormick v. Salmon<sup>37</sup> on the scope of s.5(1)(f), which was inserted by the Family Law Amendment Act 1983, may throw some light on the interpretation of paragraph (ca)(i) of the definition of "matrimonial cause" in s.4(1) of the Family Law Act. Since the case raised a question as

to the limits inter se of the constitutional powers of the Commonwealth and the States, a lower court lacked jurisdiction to hear the matter and the case was removed to the High Court by operation of s.40A of the Judiciary Act 1903-1959 (Cth.). At issue was a contest over the custody of a five-year-old boy, who was born out of wedlock, between his grandmother and her present husband and the grandmother's daughter, the mother of the child. According to s.5(1)(f), for purposes of each application of the Act, a child who has been treated by the husband and wife as a child of their family, if the child was ordinarily a member of their household, shall be deemed to be a child of the marriage. The daughter's claim that the purported extension of the Family Court's jurisdiction was unconstitutional as being beyond power was accepted by the majority of the Court.<sup>38</sup>

The decision of the majority was based on the fact that, since the provisions of s.5(1)(f) were intended to operate when no divorce or other form of principal relief was pending, the only possible source of power was the "marriage power" (s.51(xxi) of the Constitution). The rights and duties of parties to a marriage with respect to the children of the marriage arise directly out of the marriage relationship and, accordingly, a law defining such incidents of marriage is a law with respect to marriage.<sup>39</sup>

On the other hand, Parliament cannot itself effectively declare that particular facts are sufficient to bring about the necessary connection with a head of power,<sup>40</sup> or, as Brennan J. pointed out,<sup>41</sup> the marriage power does not support a law regulating what "... is deemed to be, but what would not otherwise be, an incident of the marital relationship". Therefore, Parliament cannot under the power enact a law which provides for the adjudication of a dispute between persons who are not married when the child whose custody or guardianship is in issue is not a child of the marriage.

Unfortunately, property matters cannot be as easily compartmentalised as can issues of child custody. It is not easy to define the rights and duties of the parties to a marriage with respect to property nor are the parameters of the type of property ownership which may properly be considered to be an incident of

marriage easily drawn, yet an attempt was made when paragraph (ca)(i) was inserted in s.4(1).

The words "arising out of the marital relationship" were included in the paragraph in order to make a conceptual connection with the federal "marriage power" contained in s.51(xxi) of the Constitution.<sup>42</sup> Paragraphs (ca)(ii) and (ca)(iii) of the definition of "matrimonial cause" are clearly related to s.51 (xxii) of the Constitution. Bailey<sup>43</sup> expresses the view that it appears from recent decisions that the High Court as presently constituted may be prepared to give a wider interpretation of the "marriage power" than it was when Russell: Farrelly was decided,<sup>44</sup> although it should be noted that the Court's recent decision in Cormick and Cormick v. Salmon<sup>45</sup> and Re Ross Jones and Maninovich; ex parte Green<sup>46</sup> give a clear picture of the limits that have been set by the High Court. There was nothing in the judgments of the High Court in Russell: Farrelly to say that jurisdiction to hear property proceedings in the pre-divorce period could never be conferred on the Family Court. What was decided was that the particular wording of the Family Law Act at that time (especially the wording of paragraph (c)(ii) of the definition of "matrimonial cause") was not such as to express a sufficient connection with the "marriage power" in s.51(xxi).

In Re Dovey; ex parte Ross,<sup>47</sup> which concerned, inter alia, the wording of paragraph (e) of the definition of "matrimonial cause", Gibbs J. (as he then was) said that while the words "circumstances arising out of the marital relationship" in the paragraph appeared to have a wide meaning, he was in agreement with what Demack J. had said in Mills,<sup>48</sup> namely that simply because something happens between husband and wife, it does not necessarily mean that it has involved such circumstances: "... the event must be one which raised issues of law that are within the body of law defining marital relationships". Mason J. agreed with this approach,<sup>49</sup> but Barwick CJ. was more specific in his views:<sup>50</sup>

"I find no need to attempt an exposition of the nature and limits of the jurisdiction which paragraph (e) of the definition purports to give. Its language is lacking in precision and its ambit is matter of some doubt in my mind".

Should a case on the issue of the scope of the phrase "proceedings arising out of the marital relationship" come before the High Court and the majority of the Court find that its limits are insufficiently defined, there is little doubt, in the light of the decision in Russell: Farrelly,<sup>51</sup> that paragraph (ca)(i) would be ruled unconstitutional. This conclusion is strengthened by the fact that while paragraph (ca)(i) is related to s.79, which empowers the court to alter property interests as between the parties to a marriage, paragraph (e) has been held to relate to s.114(1),<sup>52</sup> which provides for property rights to be affected or regulated, but not altered.<sup>53</sup> Obviously, then, the High Court will be likely to interpret the scope and operation of paragraph (ca)(i) with particular care.

Assuming, however, that the new provision is constitutionally valid, its application is still uncertain. It is not yet clear when jurisdiction to decide issues coming under its terms arises nor what interpretation should be placed on the words "proceedings arising out of the marital relationship".

While paragraphs (ca)(i) and (e) of the definition of "matrimonial cause" in s.4(1) differ in that the first concerns "proceedings" and the latter concerns "circumstances", both contain the phrase "arising out of the marital relationship". That decisions on the application of paragraph (e) will provide enlightenment as to the interpretation of paragraph (ca)(i) is made clear by In The Marriage of B. and B.,<sup>54</sup> the first reported decision on an application under the latter paragraph. The Full Court<sup>55</sup> was referred by counsel for the wife to the decisions in Mills<sup>56</sup> and Farr,<sup>57</sup> both of which concerned an application for an injunction in circumstances arising out of the marital relationship. In B. and B.,<sup>58</sup> the Court refused to make a property order in relation to real estate purchased in joint names by a former husband and wife after their divorce because there was no nexus between the events surrounding cohabitation after the dissolution of the marriage and the original marital relationship. Just how proximate the nexus must be if there is to be a valid application based on jurisdiction arising under paragraph (ca)(i) is not made clear by the decision, nor by that in Raffellini v. Raffellini and Others,<sup>59</sup> where the application under paragraph (ca)(i) to have partnership

interests adjusted was refused because the partnership concerned included persons other than the parties to the marriage.<sup>60</sup>

As far as the question of when the jurisdiction to hear applications under the paragraph arises is concerned, however, enlightenment must be sought other than in decisions concerning the interpretation of paragraph (e) of s.4(1). Paragraph (e) does not involve the declaration of property interests nor their alteration, merely their protection. Paragraph (ca)(i), related as it is to s.78 and s.79 of the Act, empowers the Court to declare property interests as between the parties to the marriage according to the common law principles of law and equity (s.78) and to alter them if it thinks fit to do so (s.79(1)). It is clear that applications made for a declaration of legal and equitable interests in property as at the time of the hearing will present few problems. However, an application to alter property rights under s.79 has been seen traditionally as something which arises from the breakdown of marriage and the need for the financial affairs of the parties to be re-arranged following that breakdown.<sup>61</sup> As will be indicated in Chapter Five of this study, s.79 involves the Court in the quantification of contributions made by the parties to the property in question ("the retrospective element") as well as an assessment of their future needs ("the prospective element") according to the principles set down in s.75(2) (incorporated by s.79(4)(e)).

In light of s.81, which enjoins the Court "as far as practicable (to) make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings under Part VIII, other than proceedings under s.78 or proceedings with respect to maintenance payable during the subsistence of the marriage, it is obvious that amendments to s.79 by the Family Law Amendment Act 1983 were necessary to allow for the fact that there might be the resumption of cohabitation or maybe the birth of further children after an application under paragraph (ca)(i) had been made. A final order under s.79 would not be capable of subsequent variation should the parties resume cohabitation and not finally separate or should they divorce years later. In such situations, the final order under s.79 made years previously might exhaust the jurisdiction of the Court to deal with



further property disputes between the parties,<sup>62</sup> nor would a Supreme Court be able to provide relief, since the application for a property order, being a matrimonial cause, would fall outside its jurisdiction.

The adjournment provisions in s.79 recognise the seriousness of the situation where, before proceedings for divorce are commenced, or before proceedings for a declaration as to the validity of a foreign dissolution,<sup>63</sup> annulment or a legal separation have been instituted, either of the parties to a marriage brings a property dispute before the Court under paragraph (ca)(i). Counselling by a Registrar or Deputy Registrar of the Family Court has been made compulsory, except in special circumstances, before a property dispute can be brought before the Court by s.79(9). Section 79(1B) confers a discretionary power of adjournment in property proceedings arising out of the marital relationship.<sup>64</sup>

The power of adjournment may be exercised on such terms and under such conditions as the Court thinks fit and for such period as it thinks necessary to enable the parties to the proceedings to consider the likely effects (if any) of a s.79 order on the parties to the marriage or the children of the marriage. Section 79(1C) reserves the right for parties to apply for a hearing of the adjourned proceedings where a "matrimonial cause" of the type defined in paragraph (ca)(ii) and (ca)(iii) arises.

Where it is likely that there will be a significant change in the financial circumstances of the parties to the marriage or either of them, s.79(5) empowers the Court to adjourn proceedings with respect to property if it sees fit.<sup>65</sup> Section 79(7)(a) and (b) refer specifically to benefits from a superannuation fund or scheme or discretionary trusts which may accrue in the future. The powers of adjournment are not limited to those circumstances, however. Under the provisions of s.79(6), the Court may make partial or interim orders with respect to property the parties then have before adjourning proceedings under s.79(5) or s.79(7).<sup>66</sup>

Hardingham and Neave<sup>67</sup> are of the opinion that the jurisdiction to hear property "proceedings arising out of the marital relationship" is confined to claims arising because of the need to determine rights

and entitlements to property, whether owned by either or both of them, as a result of breakdown of marriage:

"Thus proceedings to determine who owns what and shall thus have possession of what a breakdown of marriage (s.78) or to determine who, irrespective of title shall have what on breakdown of marriage (s.79) will fall within sub-paragraph (i)".<sup>68</sup>

This view appears to be unnecessarily restrictive. In fact, it may be claimed that such an interpretation is contrary to the underlying theme of the Family Law Act (1975), that is, that it strives towards reconciliation rather than marriage breakdown.<sup>69</sup> As Freeman<sup>70</sup> puts it:

"(I)s it a way of buttressing faltering marriages (an avowed objective of recent divorce legislation) to provide adequate property solutions only on final breakdown?"<sup>71</sup>

If the only application of paragraph (ca)(i) were after breakdown, many parties would wait until proceedings for principal relief were available before making an application under s.79, since in the interim the status quo of all property can be preserved temporarily by restraining orders granted under s.114, sub-sections (1) or (3),<sup>72</sup> and the widest range of property possible could be dealt with during a single hearing in proceedings taken under paragraph (ca)(ii).<sup>73</sup>

Murray J. adopted a more robust approach to the interpretation of "circumstances arising out of the marital relationship" (s.(4)(1), paragraph (e) of the definition of "matrimonial cause") in Farr.<sup>74</sup> Her Honour expressed agreement with what Demack S.J. had said in Mills,<sup>75</sup> namely that "... events which raise issues of criminal law, industrial law or fiscal law cannot be brought within the marital relationship simply because the circumstances involve a husband and wife and their children". However, Murray J. went on to say:<sup>76</sup>

"... as I read the Family Law Act, its linchpin is marital breakdown or marital difficulties. The Act

is designed to provide remedies as between husband and wife in relation to any disputes that arise as a result of marital difficulties, and this in many cases regardless of whether or not proceedings for dissolution can be or, for that matter, should be, commenced. It appears to me that the moment that the marital difficulty or breakdown occurs, events thereafter involving disputes between husband and wife arising because of that difficulty or breakdown must be circumstances which arise out of the marital relationship ...".<sup>77</sup>

It is submitted that this approach, which allows for jurisdiction to arise on either marital breakdown or on the occurrence of marital difficulty, if applied to the interpretation of paragraph (ca)(i), would have significant advantages. It would enable a spouse before a marriage actually broke down to make an application for a declaration of property interests under s.78 or a readjustment of property entitlements under s.79 where there is a disputed debt between the parties,<sup>78</sup> provided, of course, the conditions under which the debt could be recovered were present,<sup>79</sup> or where the other spouse has wasted assets,<sup>80</sup> abused his powers,<sup>81</sup> or become bankrupt. The Australian Law Reform Commission, which is currently conducting an inquiry into insolvency,<sup>82</sup> has isolated problems of particular significance to members of the insolvent's family and their "interests" in matrimonial assets. For example, under current law, the interest of an insolvent in a home, matrimonial or otherwise, is not exempt from the operation of the laws relating to bankruptcy. If the home is matrimonial, what is the quantum of interest held by the insolvent? Determining the quantum of the estate claimed and the facts upon which it is founded so that a caveat to protect an equitable interest in Torrens land could be lodged would provide the other party's interests with protection, not only in the case of insolvency but in other circumstances as well. While in Ioppolo v. Ioppolo<sup>83</sup> it was held that a potential claimant under s.79 has a caveatable interest in registered land, it has been held since that as such there is no such caveatable interest.<sup>84</sup> It is submitted that the availability of s.79 proceedings under paragraph (ca)(i) overcomes this impediment. Where insolvency coincides with the breakdown of the marriage, there is a contest between creditors

and the solvent spouse: should the present rule of "first in, first served" be abrogated by the immediate availability of property proceedings to provide the disadvantaged spouse with a remedy? Should one spouse, unhappy with the other, be able to thwart family law claims of the other by causing the property to vest in an insolvency administrator under the Bankruptcy Act 1966 (Cth.) before the other party is able to take proceedings under s.79? The immediate availability of a court decision under s.78 and s.79 would provide the solution to these problems.

Justification for the view that under certain circumstances there should be no need for a spouse to wait for actual breakdown of the marriage before making an application appears in the judgment of Evatt C.J. and Marshall S.J. in Sieling.<sup>85</sup> While they recognised that orders under s.79 are not declaratory but prospective in their effect, their Honours emphasised that:

"... the basis upon which the orders are made has a strong retrospective element. Because of that retrospective element a spouse's entitlement to apply for an order under s.79 is an important interest, an interest which has, in a sense, been building up during the marriage".

The Western Australian experience provides interesting illumination on this point. According to the Family Law Council Annual Report, 1981-2,<sup>86</sup> 60% of all property applications are brought under s.30 of the Family Court Act 1975 whose terms are available prior to an application for the dissolution of marriage. Of these applications, the vast majority, but not all, are made after separation but before the twelve month period of separation has elapsed and divorce proceedings may be taken.<sup>87</sup>

Assuming that the amendment will be held to be constitutional and that property proceedings may be instituted prior to principal relief under paragraph (ca)(i), the adjournment technique employed in Emmett<sup>88</sup> ought no longer be necessary so long as the proceedings fall within the terms of the paragraph.<sup>89</sup> In Emmett,<sup>90</sup> the Full Court ruled by a majority that divorce proceedings should be adjourned so that a property application could be dealt with while

both parties were still married. Had divorce come first and the husband then died, Testator's Family Maintenance proceedings could not have been maintained as s.3 of the Testator's Family Maintenance and Guardianship of Infants Act 1916 (N.S.W.) excluded an application under the Act by a divorced wife.<sup>91</sup> The New South Wales legislation has been since amended by the Family Provision Act 1982 and a divorced wife is no longer precluded from pursuing an application.

To determine what interests a spouse has built up in property during marriage through indirect contribution to its acquisition, conservation and improvement and what parameters should be drawn around the type of property ownership which may be considered an incident of the marital relationship is far from easy.<sup>92</sup>

Consistently with the decision in Russell: Farrelly,<sup>93</sup> property disputes between husband and wife must either have some connection with the circumstances of the dissolution of the marriage or have some connection with the marital relationship.<sup>94</sup> When the marital relationship of the husband and wife has broken down or serious difficulties with regard to property matters have occurred, it may be necessary that the proprietary relationship which has arisen between the parties as a result of their marriage should be terminated or at least rendered workable to the extent that may be necessary to enable the marital relationship to continue. On the other hand, the parties may have business or other dealings with each other which are completely separate from their marital relationship. For example, a dispute in relation to a debt owed one party by the other will only be within the definition of paragraph (ca)(i) if the dispute has arisen as one aspect of the breakdown of the marital relationship or the difficulties of the matrimonial relationship. In Slattery,<sup>95</sup> the Full Court held that neither the powers of the Court relating to maintenance (Sec. 72, 74 and 75) nor the power relating to alteration of property interests (s.79) conferred jurisdiction to order the repayment of money lent by a wife to a husband during the course of a marriage. The Full Court held that the repayment of the loan was not a matter of maintenance since it did not involve consideration of needs and abilities to pay as required by s.75, nor was it a matter of alteration of property interests since it did not deal with any particular item of property of a party to the marriage.

A possible test as to whether property proceedings might be said to arise out of the marital relationship is "the time of acquisition" test.<sup>96</sup> That is, all property acquired by the parties and dedicated to family or domestic use during the course of the marriage would be encompassed by paragraph (ca)(i). Excluded would be property acquired before marriage or following separation; property acquired by reason of gifts or inheritance quite outside the marriage; gambling winnings or windfalls which are unrelated to the marriage; and common law damages claims, also unrelated to the marriage. This test has the disadvantages that have been found to be associated with the categorisation of matrimonial property in jurisdictions such as New Zealand and Ontario,<sup>97</sup> which have adopted a system of deferred community of property with an equalization of property of a matrimonial character at the time of divorce.

Another test might be the "use or application test" such as that suggested by Professor Kahn-Freund,<sup>98</sup> but as has been already indicated in Chapter Three, Part A, of this study, this test has its own problems of categorization.

If there has been a contribution to the acquisition, improvement or conservation of an asset during the marriage by reason of the matrimonial relationship and the financial inter-dependence intrinsic in such marital relationship, and the proceedings are intended to seek recognition of that contribution, then it would be obvious that the proceedings were brought to enforce rights by reason of contributions made because of the marital relationship. The homemaker and parent contributor would be recognized by "the contribution test".

Another test might be called the "limited causation test". It might be argued that, because of the marriage, certain property arrangements have been made, or but for the marriage, these property arrangements would not have been made. This test, however, may be criticised on the basis that it is reminiscent of the "pecuniary prejudice" approach which has been condemned as encompassing considerations of a negative contribution.<sup>99</sup>

All of the tests outlined above involve problems of categorisation of property and also give rise to difficulties with regard to property

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acquired before marriage or business interests built up during the marriage solely by the contribution of one party, apart from a contribution as homemaker and parent by the other.

Broun<sup>1</sup> is of the view that the correct test could be broader than any of those discussed above. What is required by paragraph (ca)(i) is that the proceedings (not the property) should arise out of the marital relationship. He suggests a "proceedings causation test" involving the positing of the question, "But for the marital relationship would these proceedings have arisen?" This enables an assessment of whether the husband and wife have reached a state of marital breakdown or serious marital disfunction which has led them into litigation or proceedings to ascertain or to determine their proprietary rights or to apply for protection of their proprietary rights. Broun claims<sup>2</sup> that:

"On this test, all the constitutional problems are overcome so as to include the widest range of what are essentially marital disputes. The only class of proceedings between a husband and wife as to property matters which may not fall within the definition would be perhaps proceedings relating to proprietary rights which had no logical or causal connection whatever with the marriage and which did not arise out of the state of their marital relationship for example because they were still living harmoniously together. However, such classes of litigation could be envisaged as being very rare".

What Nygh J. said in Fisher<sup>3</sup> puts the position more succinctly. For him, the gravamen of a property claim must arise out of the contributions of the parties made during the marriage or the needs and disparities created by or arising from the marital relationship. The discretion that the court has under s.79(1B) to adjourn property proceedings taken under paragraph (ca)(i) would enable it to take into account the situation where the parties have not actually separated or where there may be the possibility of a reconciliation.

On the "proceedings causation test", it could be asserted that proceedings between parties concerning the disposition of the

matrimonial home would certainly fall within paragraph (ca)(i).<sup>4</sup> In Caddy and Miller,<sup>5</sup> a recent decision of the Full Court, a property dispute between the parties which arose from their relationship as married persons prior to their divorce in 1974 was held to have arisen out of the former marital relationship and as a consequence of and thus in relation to its dissolution. This liberal interpretation of the scope of paragraph (ca)(i) suggests that the Full Court has adopted a "broad brush" approach to the amendment. On the other hand, proceedings which did not arise out of the mutual liability to maintain each other or out of the joint liability to maintain children of the marriage could not be said to be "proceedings arising from the marital relationship".<sup>6</sup>

Even on the widest interpretation of paragraph (ca)(i), then, a small residual category of property disputes will still fall to be decided under State law. Such disputes will not involve proceedings arising out of the marital relationship, nor will they involve proceedings which relate to concurrent, pending or completed proceedings for principal relief, nor proceedings as to the validity of a foreign dissolution or annulment or a decree of separation. On the other hand, it must be remembered that, in appropriate circumstances, State jurisdiction can be effectively pre-empted by the use of the injunctive power under s.114 of the Family Law Act 1975 pending the institution of proceedings for principal relief.<sup>7</sup>

It is clear that the only complete solution to the problem of dual jurisdiction over property matters is a reference of power over property matters by the States to the Commonwealth.<sup>8</sup>

## PART C

### THE EFFECTS OF S.109 OF THE CONSTITUTION

Section 109 of the Constitution provides that:

"When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."



As Rumble<sup>9</sup> puts it, this section is "... the cutting edge of Commonwealth supremacy under the Constitution".

Section 39 of the Family Law Act 1975 grants to the Family Court of Australia and Magistrates' Courts<sup>10</sup> exclusive jurisdiction over matrimonial causes,<sup>11</sup> the Supreme Courts' federal jurisdiction under the Act in matrimonial causes having been terminated under s.40(3) of the Family Law Act as of 1st June, 1976.<sup>12</sup> The relevant matrimonial causes associated with property proceedings are defined in s.4(1). Paragraph (ca) of the definition refers to proceedings with respect to the property of the parties, being proceedings:

- (i) arising out of the marital relationship.
- (ii) in relation to concurrent pending or completed proceedings for principal relief.
- (iii) in relation to the foreign dissolution of annulment of that marriage or the legal separation of the parties to that marriage, if such dissolution, annulment or legal separation is recognised as valid in Australia under s.104.

s.4(1)(e) refers to proceedings for an injunction or order in circumstances arising out of the marital relationship while s.4(1)(f) includes any other proceedings in relation to proceedings under s.4(1)(ca) and s.4(1)(e).

Theoretically, then, the characterisation of a proceeding as a matrimonial cause grants to the Family Court of Australia exclusive jurisdiction over the issue concerned. In practice, the notion of what constitutes a matrimonial cause has proved to be very elastic.<sup>13</sup> As Wade<sup>14</sup> has put it, "(T)he somewhat mysterious constitutional boundaries of 'matrimonial cause' as contained in s.51 (xxii) is discovered only by trial-and-error - that is by statutory amendment and subsequent judicial interpretation".<sup>15</sup>

The Supreme Courts have taken any one of four possible courses in proceedings with respect to the property of parties to a marriage. First, the Supreme Court may hold that the matter should properly be categorised as a matrimonial cause. Therefore, it will deny

itself any jurisdiction in the matter because of the operation of s.8 and s.40(3) of the Family Law Act 1975.<sup>16</sup> Secondly, the Supreme Court may deny that the matter is a matrimonial cause<sup>17</sup> and therefore entertain the proceedings despite the prospect of inconsistent Family Court proceedings.<sup>18</sup> Thirdly, the Supreme Court may find that the matter is not a matrimonial cause and that it technically has jurisdiction, yet decline to exercise it on the grounds that the Family Court is forum conveniens.<sup>19</sup> Finally the Supreme Court may avoid classifying proceedings as a matrimonial cause and cede jurisdiction to the Family Court by regarding State jurisdiction as being suspended by the operation of s.109 of the Constitution.

As Kovacs<sup>20</sup> points out, the diversity of approach may encourage parties to a marriage to undertake "forum shopping" in order to obtain the most favourable result. To a certain extent, the amendment to the definition of "matrimonial cause" in s.4(1) by the insertion of sub-paragraph (i) will overcome these problems, but it has already been indicated that this amendment may well have limitations. Of all of the possible approaches, that of abdicating Supreme Court jurisdiction to the Family Court has the most to recommend it, since it is in keeping with the philosophy of the Family Law Act.<sup>21</sup> In the meantime, State Supreme Courts cannot bind each other, and the varied attitudes towards the extent of a State Supreme Court's jurisdiction in disputes between the parties to a marriage remain.

The issue of inconsistency as between the laws of the States and the Commonwealth has been complicated by the fact that there are several approaches to the characterisation of laws as inconsistent.<sup>22</sup> Dixon J. in Victoria v. The Commonwealth<sup>23</sup> (The Kakasiki) stated the test of inconsistency as follows:

"When a State law, if valid, could alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid".

When considering inconsistency, it is necessary to ask such questions as whether the federal law is valid; whether the scope, or field of operation, of the State law is the same as or differs from that of

the Commonwealth law;<sup>24</sup> whether the Commonwealth law or the State law impose different requirements in respect of the same subject matter;<sup>25</sup> whether the State law detracts from rights or liberties granted by a Commonwealth law;<sup>26</sup> and whether the Commonwealth law evinces an intention to cover exhaustively the subject matter it deals with, to the exclusion of any other regulation of that subject (the "covering the field test").<sup>27</sup>

The last-mentioned test of inconsistency is, perhaps, the most important.<sup>28</sup> Under this test, inconsistency can arise even where compliance with both laws is possible and where the Commonwealth Act shows a legislative intention to deal with the whole subject matter covered by the State Act even if it deals with it by abstention.<sup>29</sup>

While the Full Court in Smith<sup>30</sup> examined the scope of s.109, no analysis of the "covering the field test" was made.<sup>31</sup> The Supreme Courts have grappled with the section but the variation in their approach has merely added to the confusion.

In the New South Wales Supreme Court, for example, Waddle J. in Reynolds v. Reynolds<sup>32</sup> regarded his jurisdiction as subsisting in property proceedings between the parties to a marriage which had broken down but not yet proceeded to divorce. State jurisdiction, in his view, survived because the Commonwealth Parliament had not intended to "cover the field". Waddle J. designated the uncovered field as that of property proceedings prior to the availability of dissolution proceedings. Kearney J. of the same Court also declined to find in McLean v. McLean<sup>33</sup> that the field of "enforcement of agreements or foreign decrees" was intended to be covered by the Family Law Act. Yet South Australian Supreme Court judges are inclined to regard the Act as covering a very extensive field: for example the view of "the field" of Jacobs J. in Tansell v. Tansell was "... the breakdown and dissolution of marriage and the resolution of property questions consequent thereon".<sup>34</sup> The understanding by Jacobs J. of the field intended to be covered clearly indicates those areas left uncovered in the views of his New South Wales brethren.

The High Court, in examining the extent of the Family Court's jurisdiction, has pursued two lines of enquiry, looking either at the property which is the subject of dispute between the parties or at the nature of the relief sought in the relevant constitution. Either approach leads to problems.

As far as the property which is the subject of the dispute is concerned, it has already been shown in the preceding section of this chapter that the characterisation of proceedings with relation to property as proceedings "arising out of the marital relationship" (paragraph (ca)(i) of s.4(1)) will depend entirely on whether a broad or a narrow approach to the phrase's interpretation is adopted. Therefore, in Tansell v. Tansell,<sup>35</sup> where he was dealing with an application for an injunction in "circumstances arising out of the matrimonial relationship" under s.4(1)(e), Sangster J. denied that proceedings for severance of the joint tenancy in the matrimonial home arose out of the marital relationship. In his Honour's view, they were referable to the joint ownership of the property: the fact that the property in question was used as the matrimonial home was irrelevant.<sup>36</sup> The husband and wife in Mills<sup>37</sup> were denied relief because their dispute over the right to remove topsoil from jointly-owned property was held to arise out of their position as joint tenants and not out of the fact that they were married, yet in Bak,<sup>38</sup> Opas J. was able to designate proceedings in relation to a milk-run business, operated by the parties to the marriage as a commercial trading partnership, as arising out of the marital relationship.<sup>39</sup>

There has also been variation in approach in the interpretation of the definition of "matrimonial cause" in paragraph (ca)(ii) and its antecedents. In Lansell v. Lansell,<sup>40</sup> a fourteen-year time lapse between divorce and property proceedings did not prevent the proceedings for property adjustment from being deemed to be appropriately related to proceedings for principal relief, whereas in Grist and Ford<sup>41</sup> and Rennie and Higgon,<sup>42</sup> a five-year lapse was held to have severed the necessary relationship between the proceedings.<sup>43</sup>

In Re Ross-Jones; ex parte Beaumont,<sup>44</sup> Gibbs J. stated that the phrase "in relation to" could be explained in the following terms:

"An application by a divorced wife under sec.79 of the Act for a settlement and transfer of property is an application to the Court to make such financial adjustments as may be rendered appropriate by the dissolution of the marriage; it is an application for an order consequential on the dissolution of the marriage, and can properly be said to be incidental to the decree of dissolution that has been obtained".

Holding that by this test the Family Court had jurisdiction in post-divorce property proceedings where first, the proceedings were commenced because the marriage had been dissolved or was about to be dissolved; and secondly, where the property subject to the dispute is jointly owned, Nygh J. in Rennie and Higgon<sup>45</sup> was unable to find the appropriate connection between the application for a property settlement and the proceedings for divorce, since the parties had asked the Court to settle a dispute between them in relation to an agreement they made after their divorce.

An equally obscure area is the question of when the inconsistency arises. Jacobs J. in Tansell v. Tansell<sup>46</sup> was of the view that the mere existence of federal jurisdiction in the field intended to be covered by the Commonwealth Act gave rise to the inconsistency, but Bray C.J. in the same case felt that there needed to be a valid application made to the Family Court under the Act before State jurisdiction was ousted.<sup>47</sup> Unfortunately, the High Court has not undertaken any thorough review of the decisions on s.109 as it relates to the Family Law Act.<sup>48</sup> As recently as 1982, in D.M.W. and Anor. v. C.G.W.,<sup>49</sup> it failed to avail itself of the opportunity to settle the law nor did it provide guidelines as to the future application of s.109. The Commonwealth submitted directly in relation to the Act that the judicial power of the Commonwealth established by Chapter III of the Constitution is paramount over the judicial power of the States. Of all the members of the Full Bench, only Gibbs CJ. took up the question of s.109, and his statement is ambiguous. His Honour said,<sup>50</sup>

"If a law of the Commonwealth either expressly, or by implication, provides that a judgment of a federal court shall prevail over inconsistent

decisions of State Courts, that law will take effect accordingly, and the decisions of the federal court will be paramount."

In referring to the need for the existence of a federal court order, the Chief Justice may have contemplated a timing requirement that was more onerous than the "application" test, narrow thought it was, used by Bray CJ. in Tansell v. Tansell.<sup>57</sup> On the other hand, Gibbs CJ. may have been referring simply to the facts before him in D.M.W. and Anor. v. C.G.W.<sup>52</sup> where there was already a Family Court order in existence before the matter of State jurisdiction arose. Regrettably, the other six judges of the Full Bench did not express opinions as to the application of s.109, deciding that the existence of a prior order of the Family Court ousted Supreme Court jurisdiction.

By extrapolation from D.M.W. and Anor. v. C.G.W., Kovacs<sup>53</sup> suggests a practical test to resolve the conflict between federal and State jurisdiction in property disputes between the parties to a marriage. First, it may be asserted that, once a Family Court order exists, Supreme Court jurisdiction in relation to the disputed property is lost while the Family Court order stands (that is, until the order is removed by appeal or by an order for prohibition).<sup>54</sup> Secondly, if Supreme Court proceedings are commenced at a time when Family Court proceedings are simultaneously initiated or when they are foreshadowed, then while it is not possible at this stage to claim that Supreme Court jurisdiction is lost, nevertheless as a matter of comity<sup>55</sup> and to prevent abuse of its own process, the Supreme Court ought to refuse to entertain the action before it. As Kovacs summarises the test, it would be: Has there been or will there be a Family Court order?<sup>56</sup> The results would be as follows:

- (1) If the Family Court considered the matter before it to be a matrimonial cause, then State jurisdiction would give way as the Family Court would be likely to make an order in relation to the property.
- (2) If the Family Court considered the matter before it not to be a matrimonial cause, a State order in relation to the property could be made.

- (3) Should the Family Court consider the matter before it to be a matrimonial cause yet decline to hear it, then no question of an inconsistent order would arise and the State jurisdiction properly could be exercised.<sup>57</sup>

In McKay,<sup>58</sup> Strauss J. expressed the view that the word "matters" in s.3(1)(a), which defines the Family Court's jurisdiction, refers to matters arising in proceedings for remedies which the Court has power to grant. According to this approach, Kovacs' test could be expressed as follows: Has the Court granted a remedy or has it the power to grant a remedy in this matter? However, as Gibbs C.J., Stephen, Mason and Wilson JJ pointed out in Thomson Australian Holdings Pty. Ltd. v. Trade Practices Commission and Others,<sup>59</sup> although the two matters of whether the Court has the power and the jurisdiction to make the orders sought are often treated as synonymous, there is "... in general, a distinction ... to be made between the jurisdiction to hear and determine a matter and the power of that court to grant relief of a particular kind". Nygh J. observed in McKay<sup>60</sup> that there nevertheless may be situations where the restraint on the power to grant relief is so obvious that it is not necessary to inquire into the question of jurisdiction.

It appears, then, that Kovacs' test is inappropriate, except where a Family Court order has already been made. This is unfortunate, as those spouses who have inchoate rights to property, the legal title of which is held by the other party to the marriage, unless they are able to first gain a Family Court order with respect to the property, either in the form of an injunction under s.114(1)<sup>61</sup> or a final order under s.79, are vulnerable to the decisions of State Courts, which must resolve property disputes according to the general rules of law and equity. Nor does the answer lie in the doctrine of stare decisis: neither court can bind the other, except to the extent that the Family Court has jurisdiction to decide non-Federal matters under its accrued jurisdiction,<sup>62</sup> as they operate within different hierarchies.<sup>63</sup>

Consequently, it may be concluded that the question of jurisdiction as between the Family Court and the State Supreme Courts cannot be resolved by the application of s.109 of the

Constitution, clear cut though this section at first appears, because of the uncertainties associated with designating the field sought to be covered by the Family Law Act and with identifying the time at which inconsistency may be said to arise between Federal and State laws.<sup>54</sup>



CHAPTER FIVETHE FAMILY COURT'S PROPERTY JURISDICTIONPART ATHE COURTS EXERCISING JURISDICTION UNDER THE FAMILY LAW ACT 1975

Four court systems, compendiously termed "the Family Court", can hear proceedings relating to "financial matters" (property and maintenance proceedings: see the definition in s.4(1) of the Act) which fall under the terms of the Family Law Act:

- (1) the Family Court of Australia: s.39(1)(a) and s.31(1);
- (2) the Supreme Court of the Northern Territory: s.39(1)(b), s.40(3) and s.40(4);
- (3) courts of summary jurisdiction:<sup>1</sup> s.39(2). (But note that the jurisdiction of these has been terminated in the Perth metropolitan district, except at the Court of Petty Sessions in St. George's Terrace, pursuant to s.39(7));
- (4) the Family Court of Western Australia: Family Law Act 1975 (Cth.), s.41; Family Court Act 1975 (W.A.)

The jurisdiction of the Supreme Courts of the States and the Australian Capital Territory under the Family Law Act 1975 was terminated by proclamation of the Governor-General, pursuant to s.40(3) of the Act, on 27th May, 1976,<sup>2</sup> with effect from 1st June, 1976.

Although the Family Court is described in s.21(2) of the Act as a superior court of record, it does not have a general legal and equitable jurisdiction,<sup>3</sup> for its jurisdiction is limited.<sup>4</sup> The boundaries of its jurisdiction, necessary for constitutional reasons, appear from s.31 of the Act.<sup>5</sup> It is clear law that a court of limited jurisdiction has the authority and the duty to decide whether a controversy brought before it lies within the limits of its jurisdiction, but that its decision on such a question is not conclusive.<sup>6</sup> The High Court has within its discretion a power under s.75(v) of the Constitution to issue

prohibition to the judges of a federal court, including the Family Court, to prevent them from exercising a jurisdiction which they do not possess.<sup>7</sup> Because of the existence of a right of appeal to the Full Court of the Family Court, the High Court may withhold the writ of prohibition on discretionary grounds,<sup>8</sup> although this is by no means an invariable rule.<sup>9</sup> As for appeals from a decision of the Full Court to the High Court, these will be heard only in extreme circumstances: s.95 of the Family Law Act.

As a result of the Family Law Amendment Act 1983, an Appeal Division of the Family Court was established. The Appeal Division consists of five permanent members<sup>10</sup> and an unspecified number of other judges who hold appointments for two years only. Each Appeal Court must consist of at least two members of the Appeal Division; the third judge can be drawn from the Judges of the Court, who form the General Division.<sup>11</sup>

The considerable variation in the determination of the Full Court has been criticised.<sup>12</sup> However, those who advocate equal division of assets as a starting point in the Family Court's deliberations in order to gain predictability of result obtain no support for their views in the words of s.79, as the High Court pointed out in Mallet v. Mallet.<sup>13</sup> Such an approach would require the judiciary to take two steps, first, to equate indirect non-financial contributions with direct financial contributions and secondly, once having determined that such contributions were to be equated, then to further hold that "entitlement" was to be determined by reference to equality as well.

In the recent case, Norbis v. Norbis,<sup>14</sup> the High Court ruled that the Act does not require the Family Court to take any particular method of reasoning in its deliberations regarding s.79 orders, so long as the factors specified in the section are taken into account. However, their Honours expressed various views on the appropriate manner in which to reconcile the preservation of the wide discretionary jurisdiction with the widespread community desire for consistency in its application.

In a joint judgment, Wilson and Dawson JJ. considered that the Family Court should not attempt to formulate abstract principles or

guidelines which would confine judicial discretion within a pre-determined framework. Mason and Deane JJ. (in a joint judgment) and Brennan J. took a different view. For them, the only compromise was to be found in the development by the Full Court of guidelines as to the manner in which the complex discretionary assessments and judgments involved in the jurisdiction should be made. Such guidelines would not be binding but an unexplained failure by a trial judge to apply a guideline might indicate that the judge's discretion had miscarried. Mason and Deane JJ., however, envisaged situations in which an appellate court's guidance would have the force of a binding rule whereas Brennan J. emphasised that "... the width of a statutory discretion is determined by statute; it cannot be narrowed by a legal rule devised by the court to control its exercise".<sup>15</sup>

On the other hand, as Wade<sup>16</sup> has pointed out, "... a liberation of discretion from precedent or prima facie principles, if it occurred, would encourage litigation and forum shopping, discourage settlement, reduce legal advice by lawyers and registrars to a stab in the dark, and would further increase the suspicions of women's lobby groups that s.79 results in capricious and unfair property adjustments".

Hopefully, the establishment of the Appeal Division will bring about greater consistency of decisions, for the select number of judges sitting an appeals<sup>17</sup> will bring with them a range of experience.<sup>18</sup> In a case where allegations of financial misconduct on the part of one spouse have been aired by the other, it is submitted that it is highly desirable that certain principles or guidelines be available to the Court to assist it to make a decision which will be acceptable to both spouses, not necessarily because the result is seen as being "fair" but because it is regarded as being just under the circumstances.<sup>19</sup>

PART BTHE STRUCTURE OF THE FAMILY LAW ACT AS IT RELATES TO PROPERTY

The structure of Part VIII of the Family Law Act 1975 (Cth.), so far as it relates to property, enables the Family Court to remedy "financial misconduct" in a manner denied to courts interpreting the system of separation of property as established by the Married Women's Property Acts or applying legislation passed prior to 1970 that was intended to reform that system.

An applicant's entitlement to a property order under Part VIII of the Act will depend on a number of factors, including not only the contributions of the parties, both direct and indirect, but also the means and needs of the parties, both at present and in the future.<sup>20</sup> If the economic activities of one spouse have jeopardised the chances of the other spouse's being able to have his or her direct or indirect financial contributions recognised or his or her present and future needs catered for, these, as well as more obvious forms of financial misconduct, can be considered by the Family Court.

The two principal sections of the Family Law Act relating to property are sections 78 and 79, although other sections are of particular significance in providing remedies for financial misconduct which results in the dissipation or diminution of assets available for distribution. These are s.79A, which provides for the setting aside of orders altering property interests under certain circumstances; s.85, which provides for the setting aside of transactions designed to defeat claims under the Act; s.85A, which was inserted by the 1983 amendments in order to allow the Court to deal, to a certain extent, with assets settled by way of ante - and post-nuptial discretionary trusts; and s.114, which empowers the Court to enjoin dealings with property by a party as well as to prevent a party seeking Supreme Court orders in relation to the property.<sup>21</sup>

With s.39(1), s.31(1)(a) of the Family Law Act vests the Family Court with jurisdiction in any "matrimonial cause" and, with minor exceptions, notably in cases arising under its accrued

jurisdiction, the Court is concerned solely with disputes which arise out of the marital relationship and which lie between the parties to a marriage or former marriage.

Generally speaking, therefore, third parties are not bound by determinations of the Family Court. Different considerations may apply when a third party takes part in the proceedings, either as an intervener under s.92<sup>22</sup> or because he has been joined as a party to the dispute.<sup>23</sup> A power also exists to make orders of a temporary or an interim nature affecting third parties.<sup>24</sup> Otherwise, there is not jurisdiction in the Family Court to determine issues in controversy between a party to the marriage or a former marriage and an unconnected third party unless there is a common nucleus of fact which enables the Family Court to decide the action under its accrued jurisdiction or the proceedings fall within s.33 of the Act, which delineates the Court's associated jurisdiction.<sup>25</sup>

Since the Family Court has jurisdiction in any "matrimonial cause" as defined in s.4(1)<sup>26</sup> and not a general jurisdiction, particular provisions of the Act are governed by a particular "matrimonial cause".

#### THE PRINCIPAL SECTIONS ENABLING THE FAMILY COURT TO REDRESS "FINANCIAL MISCONDUCT":

##### Section 78

Section 78 is referable to paragraph (ca) of the definition of "matrimonial cause". Therefore, it empowers the Court to declare existing rights to property in proceedings "between the parties to a marriage"<sup>27</sup> arising out of the marital relationship<sup>28</sup>; in proceedings in relation to concurrent, pending or completed proceedings for principal relief;<sup>29</sup> or in proceedings in respect of property where the parties have obtained an overseas dissolution or annulment of the marriage<sup>30</sup> or a legal separation recognised as valid under s.104.<sup>31</sup>

Although Asche J. in McDougall<sup>32</sup> held that a s.78 application could not be brought unless existing title to the property or rights

of the parties were "uncertain or in dispute", it is submitted that Gibson J.'s approach in Vance<sup>33</sup> was more proper. His Honour contrasted the wording of s.17 of the Married Women's Property Act 1882 and s.78 and noted that the latter section, unlike s.17, does not require a question as to title or property in dispute as a condition precedent for its operation.<sup>34</sup>

Despite the enactment of s.79, the common law relating to existing property rights remains particularly important in some situations.<sup>35</sup> It should be noted, however, that while the Family Court can give common law remedies by declaration under s.78, such orders are "binding on the parties to the marriage but not on any other person": s.78(3).<sup>36</sup> On the other hand, it has been held that third parties (for example, children) may be given leave under s.92 to intervene in s.78 proceedings where they may be affected by the outcome.<sup>37</sup> The Court may determine that particular assets belong not to the parties but to a stranger, in which case it makes a finding of ownership by the stranger, but not a declaration to that effect. The finding does not vest title in the stranger but merely creates an issue estoppel between the applicant and the respondent.<sup>38</sup> Therefore, in Antmann,<sup>39</sup> jewellery in the possession of the husband was found in fact to be held by him as trustee for his daughter by a previous marriage; the Family Court had no power to declare the daughter's interest but merely the power to declare that the husband had a better possessory title to the jewellery than the wife. The Full Court in Prince<sup>40</sup> suggested, however, that if a third party submits to the jurisdiction of the Family Court by becoming directly involved in the proceedings, he or she will be bound by the Court's decision.

The declaration has relevance where one of the parties dies and it is alleged that certain property belongs to the survivor rather than to the deceased's estate,<sup>41</sup> where one of the parties becomes bankrupt and creditors need to define what is not the bankrupt's property and when that property allegedly passed to his or her partner;<sup>42</sup> where one party to the marriage claims a proprietary interest in realty registered in the other's name and wants to lodge a caveat on the title to that property;<sup>43</sup> where one party seeks a declaration as to the other's indebtedness to him or her;<sup>44</sup> and where, prior to distributing property under s.79, it is necessary

to determine what is not the property of the parties to the marriage.<sup>45</sup> If an application for property adjustment under s.79 is made more than twelve months after a couple's divorce<sup>46</sup> and leave to apply out of time is not granted under s.44(3)<sup>47</sup>, jurisdiction under s.79 withers away and the property dispute between the divorced couple must be decided according to the common law principles in s.78<sup>48</sup>. Prior to the amendment of s.44(3) by the Family Law Amendment Act 1983, where more than twelve months had elapsed after divorce, it was necessary to seek leave to institute proceedings under s.78. There was as a result a quite serious hiatus in the law since a Supreme Court might consider its jurisdiction ousted, leaving the parties with no remedy at all.<sup>49</sup>

There appears to be some doubt as to whether the Court, before making an order under s.79, should ascertain and declare the parties' respective interests in their property. Where the legal and equitable ownership of property indisputably co-incide, to apply s.78 will present no difficulties. On the other hand, the Court may be faced with the difficult task of applying the equity jurisdiction.<sup>50</sup> An examination of the decided cases shows that while certain judges prefer to declare a married couple's respective property interests before dividing the property under s.79,<sup>51</sup> Nygh J.'s observation in Aroney<sup>52</sup> that "... (i)n many cases it may be helpful to determine first what the existing property rights are as a first step in the process ... (b)ut that is not an essential pre-requisite" best expresses the attitude of the majority of the judges of the Family Court. Hardingham and Neave<sup>53</sup> point out that, where existing property rights can be varied under s.79, it is unnecessary for the party who seeks to claim an interest to first establish that he or she has a legal or equitable interest in the property which is the subject matter of the dispute, and common law and equitable principles will have little relevance.<sup>54</sup>

### Section 79

In deciding any application under s.79,<sup>55</sup> which, like s.78, is related to paragraph (ca) of the definition of "matrimonial cause" in s.4(1), the Court must take into account the totality of the assets of each of the parties<sup>56</sup> irrespective of whether these assets bear a matrimonial character. This procedure is necessary

in order that the Court can appreciate the applicant's position of need in relation to the respondent's capacity to meet that need and also so that it may ascertain the significance and extent of indirect domestic contributions made by the applicant to the acquisition, conservation or improvement of the property.

While s.79 gives a general power to the court to "make such order as it thinks fit" (s.79(1)), its particular powers are set down in s.80.<sup>57</sup> Moreover, in deciding what order should be made when jurisdiction is invoked under s.79, the Court must have regard to the various factors which are set down in s.79(4).

With limited exceptions, s.79 has no application where the dispute does not arise between the married couple but between one of the spouses and a third party, as, for example, where one party dies or becomes bankrupt and the other spouse claims an equitable interest in property the title to which has passed to the deceased spouse's personal representative or the bankrupt spouse's trustee in bankruptcy.<sup>58</sup> Therefore, the Family Court has no power in proceedings between a husband and wife to prevent third parties from exercising their legal rights,<sup>59</sup> nor is there provision for the Court to make property settlements in favour of third parties.<sup>60</sup> It should be noted, however, that s.79(1) places a child of the marriage in a different position than that of a stranger, since the sub-section specifically provides for a property settlement in favour of a child of the marriage<sup>61</sup> although even a child does not have an independent right to proceed under s.79<sup>62</sup>.

On the other hand, if a third party is granted leave under s.92 to intervene in proceedings between the parties to the marriage<sup>63</sup> under s.79, he or she may bring a claim under s.79 before the Court.<sup>64</sup> Orders can be made directly against third parties under s.79 in cases of "shams" or "devices" set up to escape its provisions,<sup>65</sup> although little use has been made so far of this exception,<sup>66</sup> or indirectly against a third party who is legally controlled by a party to the marriage, or, in other words, is a "puppet" of that party.<sup>67</sup> Also, where the evidence brought before the Court suggests that there is a common substratum of facts warranting the exercise of the Court's discretion to assume its accrued jurisdiction<sup>68</sup> to decide non-Federal as well



as Federal matters in the case before it, or the matter falls within s.33 of the Family Law Act, matters concerning the interests of third parties can come within the Family Court's jurisdiction. However, the Full Court in Prince<sup>69</sup> held that it would be inappropriate for the Family Court to exercise its accrued jurisdiction where a third party has refused to take part in the proceedings.<sup>70</sup> In such a case, only if the third party were involved in a sham or device to deceive the Court could he or she be forced to appear in proceedings.

As to the distinction between that accrued jurisdiction<sup>71</sup> which relates to issues arising directly between the parties and that which relates to issues between one or both parties and a third party, Evatt CJ. in Prince<sup>72</sup> said:

"It seems to me that in regard to s.79 the first question to determine is whether the Family Court has jurisdiction to determine a particular issue as between the parties to the marriage. If it has such jurisdiction (for example, because such a determination is a necessary part of deciding the s.79 issues) then third parties who intervene (or, possible, who appear) can be bound. (af Petersens (1981) F.L.C. 91-054; Gillies (1981) F.L.C. 91-054). On the other hand, the addition of parties by intervention cannot extend the jurisdiction of the Court."<sup>73</sup>

In Prince,<sup>74</sup> Fogarty J. doubted whether the wife's property claim on the one hand and on the other General Credits' claim to the payment of \$9 500 000, the amount for which the husband had stood guarantor in a certain transaction, could be said to be "... aspects of a single matter" or to be derived from "... a common nucleus of facts",<sup>75</sup> for these tests leave out of consideration the matter of a "... completely disparate claim constituting in substance a separate proceeding".<sup>76</sup>

The Court is required by s.79(4)(a) and (b) to take into account the direct and non-direct financial contributions of the parties to the acquisition, conservation or improvement of the

property to the parties to the marriage of either of them.<sup>77</sup>

To ascertain the extent of the direct financial contribution by or on behalf of a party with respect to the property is not a difficult exercise, for such contributions are reasonably easily ascertained by means of evidence submitted to the Court.<sup>78</sup> Direct financial contribution encompasses the payment of expenses such as rates and taxes and other charges related to the use of the property which cannot be said to have contributed to its acquisition, conservation or improvement.

By indirect financial contribution, it is envisaged that parties have shared the burden of their financial obligations between themselves, one party (the claimant) making payments of a particular type, while the other makes payment by way of direct contribution to the acquisition, conservation or improvement of, or otherwise in relation to, the property in question.<sup>79</sup>

It should be noted that the Court has insisted on some sort of relationship between the claimant's payment and the other party's contribution: the first must facilitate the second.<sup>80</sup>

If a third party, such as a parent, contributes financially to the acquisition, conservation or improvement of, or otherwise in relation to, the property, then the intention behind the contribution must be ascertained. If it was intended as a gift to both parties, then it may be regarded as a financial contribution made on behalf of both parties,<sup>81</sup> but if it was intended as a gift to one of the parties, it may be viewed as a financial contribution on behalf of that party alone, as in Rainbird.<sup>82</sup> However, in Antmann,<sup>83</sup> the Full Court observed that "... it seems to us inappropriate to consider a gift by a third party as a 'contribution' by either party. It is preferable ... to consider such a matter as a fact or circumstance relevant under s.75(2)(o)".

A gift by one spouse enabling the other to acquire a particular asset is not considered to be a contribution made on behalf of the donee spouse; it is regarded as a direct contribution by the donor spouse towards the asset's acquisition.<sup>84</sup>

Under s.79(4)(a), there is no necessity for an applicant to trace a financial contribution which was originally made to property which was subsequently lost, destroyed or alienated, into some new form of asset intended as a replacement for that property.<sup>85</sup> The original contribution will be taken into account when the Court orders a division of the parties' existing property, but the period of time which has elapsed between the disappearance of the property and the institution of proceedings under s.79 will clearly be a relevant factor in determining how much weight to attach to the contribution.

Non-financial contribution, such as the personal construction of the matrimonial home or acts of conservation or improvement, may constitute direct non-financial contributions to the property in question under the terms of s.79(4)(b). Such contribution could also be considered as freeing the other party to the marriage to expend money on the acquisition, conservation or improvement of the property or otherwise in relation to it and therefore as constituting an indirect financial contribution towards the second-mentioned property.<sup>86</sup>

Domestic contribution, that is, "the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker and parent" (s.79(4)(c)), is relevant in deciding what order (if any) should be made under s.79. Such contribution made even after cohabitation has ceased is to be taken into consideration.<sup>87</sup>

Apart from specific contributions made in the capacity of homemaker and parent,<sup>88</sup> s.79(4)(a) envisages general contributions to the welfare of the family, thereby avoiding the problem inherent in the doctrine of resulting trust,<sup>89</sup> under which a contribution can give rise to an interest only if directly related to the acquisition, conservation or improvement of the property in question. General contributions may be of a financial nature, encompassing the provision of such necessities as accommodation, clothing, food, education and access to medical and dental care. They may be of a non-financial nature also, but here parental and homemaker contributions will assume a particular relevance.

Scutt and Graham<sup>90</sup> claim that women, who more often than men make purely non-financial contributions to the acquisition of matrimonial assets, are vulnerable to the standards of individual judges regarding what is "good" or "proper" for the housewife and her family,<sup>91</sup> but it is submitted that any attempts to set down guidelines would be doomed to failure because of the diversity of attitudes in the community as a whole, not just among the judiciary, as to what the proper function of a homemaker and parent actually is.<sup>92</sup> The Australian Law Reform Commission, for that reason, has recommended tentatively that financial contributions should not be presumed to be more valuable than non-financial contributions in order to overcome the difficulties involved in quantifying the contributions made by the homemaker and parent and comparing them with economic contributions.<sup>93</sup>

Mention should be made here of the Full Court's recognition in Crawford<sup>94</sup> that the husband's self-imposed thrift had involved the wife, as well as himself, in a more frugal lifestyle while savings and superannuation entitlements were accumulated. Describing the savings as "fruits of the marriage", the Court awarded the wife a share in them as a consequence of her domestic contribution under s.79(4)(c).<sup>95</sup> Conversely, the wife in Quinn,<sup>96</sup> since the marriage of the parties was only of short duration, was held to have made a minimum domestic contribution to the acquisition of property while, in Weber v. Weber,<sup>97</sup> the wife's alcoholism and expenditure of housekeeping moneys on alcohol were looked at in the context of her homemaker contribution.<sup>98</sup>

In many cases, it will be the wife who relies upon her domestic contribution while the husband will rely on his economic contributions. Generally, then, the wife will rely on s.79(4)(c) and the husband on contribution by both parties, as a husband may establish a very real domestic contribution as well as regular property-related contributions, while a mother with a part-time job may establish significant property-related contributions as well as a domestic contribution.<sup>99</sup> In such cases, justice and equity must provide the ultimate guide,<sup>1</sup> and a final assessment of equality of contribution may afford an attractive solution.<sup>2</sup> This may not meet with community approval, however, for the Australian Institute of Family Studies in its survey of divorced couples found that both men and

women held financial contributions to be more valuable than those of a non-financial nature.<sup>3</sup> The implied value shared by the couples interviewed was that unpaid work in the home is worth less than earnings.

In Mallet v. Mallet,<sup>4</sup> the High Court emphasised that any Court called upon to resolve a property dispute under s.79 has a statutory discretion which must be exercised in relation to the facts or circumstances of that particular dispute.<sup>5</sup> The discretion to decide what is just and equitable in the circumstances of the case must not be fettered or constrained by any extrinsic rule, guide or consideration nor set out in the Act.<sup>6</sup> Therefore, the practice of starting from a standpoint of equality<sup>7</sup> was described as an impermissible fetter or consideration,<sup>8</sup> serving to pre-empt in an illegitimate manner the statutory discretion which the Court must exercise under s.79.

At first sight, the decision in Mallet v. Mallet seems to encourage what Deane J. described as a "... lawless science" of a "... codeless myriad of precedent" and a "... wilderness of single instances".<sup>9</sup> However, Hardingham and Neave<sup>10</sup> express the view that the Family Court will continue to exercise its discretion under s.79 by equating domestic effort and economic contributions in circumstances where it would have done so before the decision, not because of any disloyalty to the High Court, but simply because it is appropriate to do so. Indeed, having affirmed that a party's domestic contribution ought not be recognised in merely a token manner, Mason J.<sup>11</sup> went on to say<sup>12</sup> that

"... it is open to the Court to conclude on the materials before it that the indirect contribution of one party as a homemaker or parent is equal to the financial contributions made to the acquisition of the matrimonial home (by the other). ... To sustain this conclusion the materials before the Court will need to show an equality of contribution - that the efforts of the wife in her role were the equal of the husband in his. (Where the property in issue) ... consists of assets acquired by one party whose ability and energy has enabled the establishment

or conduct of an extensive business enterprise to which the other party has made no financial contribution and where the other party's role does not extend beyond that of homemaker and parent",<sup>13</sup>

his Honour considered that the approach will be otherwise.

In Read,<sup>14</sup> Nygh J. said:

"If there is any starting point indicated by their Honours of the High Court (in Mallet) it is that one should perhaps pay greater attention to the legal and equitable interests of the parties as a starting point and then ask oneself whether, in the light of the contributions, both financial and non-financial and, of course, in the light of the needs of the parties, it is just and equitable to adjust those rights in the particular case."

This view is consonant with Dawson J's statement in Mallet<sup>15</sup> that to speak of equality as a starting point would imply a presumption and invite a disregard of the requirements of s.79.

It does not follow that an order will not be made under s.79 simply because a party cannot establish a claim on the basis of contributions made to property. An order may also be made on the basis of the applicant's needs.<sup>16</sup> Reliance will then be placed on s.79(4)(e), which incorporates the factors set out in s.75(2).<sup>17</sup> That a property order may be used as a means of providing for the maintenance needs of one or the other spouse has been recognised in Australia since the High Court decided Sanders v. Sanders<sup>18</sup> in 1967.<sup>19</sup> An applicant who cannot establish an entitlement to be maintained by the other spouse within the meaning of s.72 nevertheless may be entitled to rely on factors arising under s.75(2) in support of a claim to a share of the property of the parties greater than that which might result from contribution alone.<sup>20</sup> In yet other cases, a party's entitlements to an order under s.79 may still leave a maintenance requirement within the meaning of s.72.<sup>21</sup>

In any application under s.79, the totality of the assets of each of the parties must be taken into account since it is necessary to assess the applicant's needs for financial provision in relation to the respondent's capacity to meet them;<sup>22</sup> to ascertain, as far as the applicant is concerned, "a standard of living that in all the circumstances is reasonable" (s.75(2)(g) as incorporated by s.79(4)(e));<sup>23</sup> and to recognise a contribution to the welfare of the family, such as, for example, in the capacity of a homemaker and parent, as not necessarily being limited to the context of what may be referred to as strictly matrimonial property.<sup>24</sup>

In Ferguson,<sup>25</sup> Watson and Wood SJJ. generalised that "... maintenance alone is based on need and economic capacity (see ss.72, 74 and 75) whereas property is based on contribution need and economic capacity (see ss.79 and 75)". Nygh J. in Aroney<sup>26</sup> observed that property and maintenance applications are complementary: "The proper method is to look at the property adjustment first and see whether this would satisfy the wife's needs for support or whether it needs to be supplemented by a lump sum or by periodic maintenance".<sup>27</sup>

"Property", in relation to the parties to a marriage of either of them, is defined in s.4(1) of the Family Law Act as "property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion".<sup>28</sup> No attempt is made, therefore, to distinguish between matrimonial property and other property.<sup>29</sup> Indeed, the Full Court has stated that the concept of matrimonial property is not known to our law,<sup>30</sup> and that "... (t)he use of labels to categorise assets tends to inhibit the discretion of the trial judge which should only be limited by the statute itself".<sup>31</sup> This view is consonant with the Australian system of separation of property during marriage with extensive powers of readjustment on divorce, based on past contributions ("the retrospective element") and allowance for future needs ("the prospective element"). As a result, "property" includes all the property of the parties at the time of the proceedings.<sup>32</sup>

The Full Court in Crawford<sup>33</sup> held that pre-existing assets

which are committed to the purposes of the marriage by one of the parties and are merged with assets acquired during the marriage will lose their significance as separate assets of the marriage as the marriage endures, but if they are kept separate and apart from the matrimonial assets during the marriage they do not form part of the "divisible assets".<sup>34</sup> Moreover, where property is received by either party through inheritance, whether during marriage or not, this is excluded from "divisible assets", subject to the limits set down in Crawford.<sup>35</sup>

In looking at assets, the Court may either adopt a global approach or isolate individual items of property and assess the proportions in which the parties should be seen to have an interest in each item. The approach taken will depend on the circumstances in each case.<sup>36</sup>

Consonant with the general view taken of contributions to a business enterprise, the Family Court has accorded special treatment to business assets.<sup>37</sup> The value of contributions of two partners to a business will not be equal, for example, if one provides services no different from any potential employee and the other is particularly industrious and offers a unique or unusual reputation, talent or ability that is the major or sole reason for the success of the venture.<sup>38</sup> If one input is unique or without ready substitute, its economic worth can be comparatively far greater, being limited only by the total return of the enterprise. While the Family Court will consider one spouse's domestic contribution to be relevant in the division of business assets according to the provisions of s.79(4)(c), unless the parties have worked in the business as joint venturers,<sup>39</sup> in which case that spouse will not be relying solely on domestic contribution, it will be more ready to acknowledge that one party has contributed more, in material terms, in labour and expertise to the accumulation of the assets.<sup>40</sup> The Court will also take into account unremunerated labours by either party undertaken for the benefit of the business enterprise<sup>41</sup> and endeavour not to adversely affect the productivity of the business and the earning capacity of the active party by the order that it makes, although the decision in Magas<sup>42</sup> shows that this may not be possible "... where property which might have given (the parties) a reasonable competence will not be sufficient for each when divided".<sup>43</sup>



It may be seen, therefore, that whereas any asset over which a spouse has legal or equitable control is potentially divisible, divisibility under s.79(4)(a), (b) and (c) is dependent on contribution, and one spouse may be able to establish that he or she has acquired a specific asset without the benefit of any contribution by the other spouse. It is on this basis that the Family Court has been able to take into account negligible contribution to the acquisition, conservation and improvement of assets, as discussed in Chapter Six.<sup>44</sup> On the other hand, it is not open to a party to place all business assets into a company or trust and at the time of the divorce claim that these do not form "financial resources" within s.75(2)(b) if that party effectively controls the assets and income of the company or trust.<sup>45</sup> In such a case, the "financial resources" of that party will comprise not the capital assets' value but the financial benefit derived from those assets.

Since personal property is either in possession or action, a chose in action may be considered to be property. Therefore, Carmichael J. in Barkley v. Barkley<sup>46</sup> held that there "... does not need to be a proprietary right (for there) to be a relevant consideration in making the property settlement; it is quite sufficient to warrant consideration if the party has a valuable right". The Full Court in Duff<sup>47</sup> cited with approval dicta of Langdale M.R. in Jones v. Skinner,<sup>48</sup> who said, "Property" is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of any possible interest which a party can have."

The statutory definition of property in s.4(1) does not include assets or interests over which a party cannot exercise legal or equitable control.<sup>49</sup> Thus, that definition may not be broad enough to cover the assets of a company or trust,<sup>50</sup> a licence personal to the holder<sup>51</sup> or a contingent future interest such as an entitlement or benefit under a superannuation fund.<sup>52</sup> However, such an asset may be regarded as a "financial resource" (s.75(2)(b)) which will be taken into account by the Court when it is exercising its jurisdiction under s.79.<sup>53</sup>

The expression "financial resource" has been given a wide interpretation by the Family Court. The following have been held

to amount to financial resources: a long-service entitlement;<sup>54</sup> a non-transferable fishing licence;<sup>55</sup> a contingent entitlement to a superannuation fund;<sup>58</sup> the interest of the object of a discretionary trust;<sup>57</sup> an insurance policy maturing at a later date,<sup>58</sup> capital moved overseas by the means of "transfer pricing",<sup>59</sup> and the controlling interest in a group of family companies.<sup>60</sup>

If a party with the financial resource can exercise a considerable degree of control over it, the value of the resource will be readily quantifiable. On the other hand, the quantification of a contingent entitlement to superannuation not conferring a proprietary interest in a definable portion of the fund will depend very much on circumstances.

Section 79(4)(f) requires the Court to have regard to any other order made under the Act affecting a party to the dispute and s.79(4)(d) requires it to take into account "... the effect of any proposed order on the earning capacity of either party to the marriage". The legislature has recognised that to require the sale of income-producing property used for conducting manufacturing, retailing, farming or a professional practice might well put the respondent out of business and dry up the income on which the parties are relying.<sup>61</sup> In such a case, the Court may order a lump sum to be paid to the applicant in order to allow the respondent to remain in business<sup>62</sup> or vest in the applicant non-income producing property so that the income-producing property is left with the party who depends on it. Further, s.43(c) enjoins the Court "to protect the rights of children and to promote their welfare"; accordingly, since the matrimonial home may be essential to provide continuing accommodation for the custodial parent and the children, there may not be simply a question of asset distribution or allocation.<sup>63</sup>

As the Full Court pointed out in Tuck,<sup>64</sup> it is ultimately a question for the judge's discretion whether it is just and equitable to order that an applicant receive a share in certain property or a fixed sum in lieu thereof.

### Judicial Discretion under Section 79

According to Professor Dworkin,<sup>65</sup> the term "discretion" can be used in two different senses. In the strong sense, it could mean that the judge is authorised to divide property as he thinks fit, free from any constraint of existing rights. If the discretion were of this type, neither spouse could be said to have a right to property prior to the court's decision. The other sense - the weak sense - of discretion implies only that the judge must use his judgment in determining the rights of the parties. He cannot advance goals which he happens to favour, even if the community would approve of the stance which he adopted. He must determine the parties' rights according to existing principles and rules. It is in this latter sense that Judges of the Family Court of Australia exercise their discretion.<sup>66</sup>

The proviso in s.79(2) that "the court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order" does not require the Court to take two successive steps in the decision-making process, namely to decide what order to make and then whether to make it. Rather, it is to be read subject to the factors set out in s.79(4). Thus, in order to invoke the discretionary power under s.79(1), the applicant is required to satisfy the Court affirmatively that, by reason of one or more of the considerations in s.79(4), it is just and equitable to make an order under s.79(2).<sup>67</sup>

While the Family Law Act 1975 provides ample opportunities for considerations of matrimonial fault to be taken into account, s.75(2)(o) providing the most obvious example, the Court will not use its powers in order to punish a party for his or her matrimonial misconduct, nor will it enquire into responsibility for the breakdown of the marriage. The section of the Act concerned with property matters concentrates on the economic realities of each situation, and Section 79 directs the Court's attention to such matters as the applicants' property-related contributions and future needs and the respondent's capacity to satisfy a proposed order. Misconduct per se is not relevant.<sup>68</sup> It will be relevant if it carries economic consequences, however. In the next

chapter, the operation of judicial discretion to achieve a just and equitable solution in order to take into account conduct which has had an economic significance in the parties' dealings with each other will be analysed.

An order under s.79 does not have to be directed to a specific item of property:

"The Court can order the settlement of a lump sum ascertained in relation to an interest in property of either party. Further, although orders cannot be directed to property other than property of the parties to the marriage, the Court can provide that its order may be satisfied by the transfer or settlement of such other property which may be under the control of a party".<sup>69</sup>

This fact allows the Court to provide relief to an applicant where a particular asset has been alienated or assets have been dissipated by the actions of the respondents.

While the approach of the Court is to ascertain what property is owned by the parties as at the time of the hearing, and then to apply s.79, if the justice of the matter requires that property acquired since separation should be given lesser significance, the Court may act accordingly.<sup>70</sup> On the other hand, the determination of a claim under s.79 is in no way akin to the taking of a partnership account, although it is within the Court's discretion to conduct a tracing exercise into separate items of property in order to establish therein "interests" which differ from the legal or equitable interests of the parties.

If the inventory of the assets reveals that both parties have little or no property, the Court will rely on their "financial resources" (s.75(2)(b)), incorporated by s.79(4)(e)). Access to "financial resources" is of particular value where the respondent has attempted to diminish the assets available for distribution under a s.79 order by placing them in a discretionary trust or under the control of a family company.<sup>71</sup> The Court is also able to take into account the respondent's future earning capacity<sup>72</sup>

or an expectancy of a superannuation payment<sup>73</sup> or other contingent interest. In those situations, special kinds of deferred property orders or maintenance orders will have to be made in order to divide the "financial resources", or in the case of an expectancy, the Court may, if it thinks fit, adjourn proceedings until the property rights fall into possession (s.79(5)<sup>74</sup> and (7)) and make interim orders relating to the property held at the time of the application (s.79(6)) in the meantime.<sup>75</sup>

### Section 81

Section 81 enacts the philosophy that there should be a clean break between the parties to a marriage when they divorce. In effect, however, rarely can the financial ties of marriage truly be severed and a clean break imposed, for as Symes points out:<sup>76</sup>

"... because of the complexity of the marriage bond, the ongoing obligations, the manifold consequences of the dependency which marriage has created and the economic realities of current social policy, modern divorce is often no more than an adjustment".

For these reasons, s.81 contains saving words: the section imposes on the Court a duty, in the formulation of orders under Part VIII of the Act, to end, as far as practicable, the financial relations of the parties. Therefore, the principle of finality may in appropriate cases give way to the need to provide accommodation for a dependent spouse and children or to allow the parties to continue as active parties in a business or to postpone the making of a final order until an expectancy falls into possession.

It is not in itself a separate head of power: it only comes into play once it is decided that s.79 (or, in an appropriate case, s.72) is applicable. The section then has a bearing on the final form of the order.<sup>77</sup> Thus it may prompt the Court to order severance of a joint tenancy as between the husband and wife and sale of co-owned premises followed by division of proceeds of sale, but it does not empower the Court to do these things: the necessary jurisdiction is given by s.79.<sup>78</sup> As pointed out in Cantarella,<sup>79</sup> "Section 81

appears to encourage the making of orders for the transfer of property<sup>80</sup> or payment of a lump sum, rather than periodical payments which can be varied under s.83".<sup>81</sup>

The Family Law Amendment Act 1983 introduced s.79(5), (6) and (7), which enable the Family Court, if so requested by either party to the marriage, to adjourn proceedings where it is likely that there will be a significant change in the financial circumstances of the parties, one or both of whom may have a property entitlement under a superannuation fund or scheme or a discretionary trust, and to make appropriate orders in the interim.<sup>82</sup>

Prior to these amendments, the Court may have been deterred by the terms of s.81 from deferring the making of an order under s.79 pending the falling-in of these benefits. However, deferment as provided for under s.79(5), (6) and (7) may not always give rise to just results. For instance, deferment may permit an employee-spouse to direct payment under a superannuation scheme or discretionary trust away from himself or herself or to alienate prospective entitlements<sup>83</sup> by borrowing on them and dissipating the proceeds of the loan. These results could also accrue if a spouse decided to wait until the expectancy fell into possession before making an application for a property order, unless the provisions of s.85 could be called into aid to set aside any dispositions that were made by the other spouse.

#### Section 79A<sup>84</sup>

While the policy underlying s.79 as set down in s.81 is to finalise the economic relationship between the parties as far as possible,<sup>85</sup> s.79A sets down circumstances in which the substantial terms of a property order may be varied or set aside by the Court, which may, if it thinks fit, make another order under s.79 in substitution for the order set aside.

Of the two sub-sections in s.79A, only s.79A(1) paragraphs (a) and (c) are relevant to this study, although it is worthwhile noting that if the terms of paragraph (b) are satisfied, the Court may do more than vary the machinery provisions by substituting its own order under s.79.<sup>86</sup> Paragraph (a) provides the Family

Court with both statutory and inherent powers<sup>87</sup> to vary or set aside orders under s.79 where it is satisfied that "there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstances". Paragraph (c), which was inserted by the Family Law Amendment Act 1983, provides for the variation or rescission of an order of the Court where there has been a default in carrying out the original order.<sup>88</sup>

#### Section 79A(1)(a)

An application under s.79(1)(a) is not an appeal on the merits of the original decision. The applicant must establish that the original order should be varied or rescinded as a consequence of a miscarriage of justice. Further, it will not be sufficient for the applicant to establish, for example, fraud or the giving of false evidence; he or she must establish affirmatively a miscarriage of justice by reason of fraud or the giving of false evidence.<sup>89</sup>

The power to set aside property orders effected under s.79 in certain narrow circumstances of miscarriage of justice is necessary due to the common experience of stress and hostility between the estranged couple before a property order, by consent or otherwise, is made. For example, to gain an advantageous property settlement a party may hide assets, overstate needs, understate financial resources or make threats concerning property, costs or children. During the various stages of grief associated with marriage breakdown, the weaker spouse may be very vulnerable to exploitation.<sup>90</sup>

While it is often claimed that the only powers available to a statutory court, such as the Family Court, are those powers expressly laid down in legislation,<sup>91</sup> there are exceptions to this proposition. Included in these exceptions is the inherent power of a court "... to set matters right where there has been a failure to observe an essential requirement of natural justice".<sup>92</sup> Under this broad concept of natural justice,

"(t)he principle that parties to litigation are entitled to be present and heard, either in person or by a duly authorized legal representative, is of fundamental importance and involves the consequence that, where through no fault of his own, a party is deprived of that entitlement, prima facie any order of a court made against him may be set aside by that court".<sup>93</sup>

Lest the inherent jurisdiction be accorded too much importance, however, it should be noted that in Re Ross-Jones and Marinovich; ex parte Green,<sup>94</sup> Gibbs CJ. said that

"(S)uch inherent jurisdiction as the Family Court may have (cannot) go beyond protecting its function as a Court constituted with the limited jurisdiction afforded by the Act".<sup>95</sup>

The components of s.79A(1)(a) will be dealt with separately.

(a) Miscarriage of justice

This term can be used to describe two situations: where the substantive order under s.79 was unjust; and where the procedure leading to the order was somehow improper or irregular.<sup>96</sup> It should be noted that occasionally, despite improper procedure, a "just" or "proper" substantive order may still result. For example, despite clear evidence of fraud or duress, the influenced party may still have received a property settlement under s.79 which was not objectively inappropriate.<sup>97</sup> This is consonant with Bray C.J.'s statement in Williamson v. Williamson that "... (j)ustice miscarries if a party does not have what the law says he shall have".<sup>98</sup>

(b) Fraud

Where there has been fraud, duress or undue influence<sup>99</sup> or unconscionability surrounding a voluntary disposition between husband and wife, it may be possible to have the disposition set aside. In initial proceedings for a property order under s.79,



the Court may simply disregard a transfer of property as between the husband and wife if it is open to attack on any of these grounds.<sup>1</sup> If a disposition is followed by a sale, the impeachability of the original disposition will allow tracing of the proceeds of sale.<sup>2</sup> Since a husband is not presumed to exercise undue influence over his wife,<sup>3</sup> this must be affirmatively proven.

According to equitable doctrines, certain dealings, whether voluntary or for value, may be set aside as unconscionable. Where a purchase is made and the transferor is poor and ignorant, the transfer was made at a considerable undervalue and the transferor has received no independent advice, the onus will rest on the transferee to establish that the disposition was not unconscionable.<sup>4</sup> In Cresswell v. Potter,<sup>5</sup> Megarry J. held that the "... more usual it is to have a solicitor, the more striking will be his absence and the more closely will the courts scrutinise what was done".<sup>6</sup> The onus of establishing the rectitude of a dealing as being fair, just and reasonable will be discharged if it is shown that, prior to its conclusion, the effect of the dealing was properly explained to the transferor and the need for independent advice was drawn to his attention.<sup>7</sup>

There is no definition of "fraud" in the Act, but it appears that statutory fraud is wider than common law fraud as defined by Lord Herschell in Derry v. Peek,<sup>8</sup> that is, that fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly,<sup>9</sup> without caring whether it be true or false. The decision of the Full Court in Suters<sup>10</sup> suggests that statutory fraud can also include situations of non-disclosure of material facts. At common law, mere silence or non-disclosure is not normally fraud; generally there is no duty of disclosure between bargaining parties<sup>11</sup>, and until the decision in Suters,<sup>12</sup> it appears that there was no duty of disclosure between husband and wife, although there was a duty of disclosure to the Court.<sup>13</sup> Recently, in Livesey v. Jenkins,<sup>14</sup> the House of Lords emphasised the need for full and frank disclosure as a matter of principle in financial proceedings between spouses and Smithers J. in Briese,<sup>15</sup> who referred to the House of Lords decision, held that there is an obligation on each party to act so as to provide a basis upon which the two of them are in a

position to resolve a case by agreement, or proceed to a hearing as expeditiously as may reasonably be done. The fact that the Family Court, in exercising its discretion to adjust property interests between spouses, must take into account a number of designated criteria, makes full disclosure imperative.

The duty of the respondent to file a detailed statement of financial circumstances "at a reasonable time prior to the return day of the application" now finds legislative expression in O.17r.2 of the Family Law Rules.<sup>16</sup>

(c) Duress

In the Marriage of S.<sup>17</sup> established that for duress to be proved, it must be shown that, in the circumstances of the case, the will of one of the parties was overborne by terror<sup>18</sup> but it may also be overborne by more subtle influences such as family pressure.<sup>19</sup> In Kokl,<sup>20</sup> Gee J. held that duress involves "... the compulsion of a person by threats of physical or mental har". Examples would include threats to engage in socially unacceptable behaviour such as vexatious litigation, violence or child-snatching.<sup>21</sup> The question to be answered in the light of the circumstances of each case is whether the will of one of the parties was overborne so as to vitiate any concessions made by that party.<sup>22</sup> Duress was considered in Soblusky,<sup>23</sup> for at the time of the final separation of the parties, the husband, goaded by his wife's bullying, had transferred to his wife his income and the interest he held in the family home for virtually no consideration at all.

(d) The giving of false evidence

In Taylor v. Taylor,<sup>24</sup> the High Court ruled that there is no reason to read the word "false" in s.79A(1)(a) as meaning "wilfully false", particularly since "fraud" is mentioned separately in the same provision.<sup>25</sup> However, the mere voicing of doubts and suspicions about the respondent's evidence in the original proceedings is insufficient. In Wilson v. Wilson,<sup>26</sup> Walsh JA. observed:

"(I)t is essential, in my opinion, that the applicant

... should produce material to the court which is such that the court can find affirmatively, if the application is based on the alleged giving of false evidence, that some of the relevant evidence, given at the hearing, on which the decree or order under challenge was based, was false".

Mason J. in Taylor v. Taylor<sup>27</sup> indicated that the courts will be slow to find miscarriage of justice by reason of false evidence since it is important to bring an end to litigation. This and "... the evil of allowing cases to be retried on the same evidence are powerful deterrents against setting aside a judgment when it appears that it has been obtained by false evidence without more". On the other hand, his Honour was willing to accept that false evidence as to divorce grounds is relevant to the property jurisdiction,<sup>28</sup> although Murphy J. was of the view that false evidence must related directly to the quantum of the property order, not to the collateral divorce order.

(e) Suppression of evidence

This ground for the variation or rescission of a s.79 order was considered by the Full Court in its decision in Taylor.<sup>29</sup> There, Asche SJ and Dovey J. said,<sup>30</sup>

"... '(S)uppression of evidence' ... must go beyond the mere giving of one-sided evidence and must amount to the wilful concealment of matters which it was her (the appellant's) duty to put to the Court. Apart from that clear duty which she owed to the Court, she was not bound to put the case for the other side."<sup>31</sup>

The duty does not require that all the evidence which is available and which might be relevant should be placed before the Court, but only such evidence as will serve to qualify or contradict assertions made to the Court by the party concerned.<sup>32</sup> Thus a party must deal with the Court in the utmost good faith and not, by withholding evidence, knowingly create a false impression or allow the Court to draw a false inference.<sup>33</sup> By the inclusion of

O.17r.2, which requires him or her to fill a detailed statement of financial circumstances "at a reasonable time prior to the return day of the application", the legislature has imposed a strong duty of disclosure on the respondent.<sup>34</sup> Variation of a s.79 order on the ground of "suppression of evidence" is not available to a party who himself simply fails to give relevant evidence either by choice or through negligence.<sup>35</sup> The Full Court in Suters<sup>36</sup> stressed that both parties have a duty of disclosure to the Court in proceedings under s.87.

(f) Any other circumstances

This phrase was added to s.79A in 1979 by amendment to the Family Law Act 1975<sup>37</sup> in order to give the section a wider application. It has been given as broad an interpretation as was the equivalent phrase contained in s.75 of the repealed Matrimonial Causes Act 1959 (Cth.).<sup>38</sup> For example, in Kokl,<sup>39</sup> the original order was rescinded because it did not allow for inflation and, in Spratley,<sup>40</sup> Yuill J. held that the words "any other circumstances" extended to a case in which a decree nisi had been made although the parties had not lived separately and apart for twelve months. On the other hand, in In the Marriage of B. and B.,<sup>41</sup> the Full Court made it clear that there must be a nexus between the original property order and the relief sought by the applicant. What the Court had really been asked to do was to set aside the original order and make a further order under quite different circumstances.

The most common "other circumstance" under s.79A when a miscarriage of justice is alleged is where a party was not present at the hearing<sup>42</sup> when the property order was made,<sup>43</sup> although non-appearance per se does not amount to a miscarriage of justice except where the respondent has evidence to place before the Court which might have led to a different conclusion; where the respondent had an adequate excuse for not attending;<sup>44</sup> and where the applicant or the respondent was guilty of some improper conduct when obtaining an order for substituted service.<sup>45</sup>

It is not possible to define exhaustively the situations that can result in or give rise to a miscarriage of justice by reason of "any other circumstances", but it has been observed that the

phrase will embrace any situation which sufficiently indicates that the order was obtained contrary to the justice of the case.<sup>46</sup>

Section 79A(1)(c)

Sub-paragraph (c) allows the Court to intervene where "a person has defaulted in carrying out an obligation imposed on him by the order"<sup>47</sup> and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order".

Nygh J. considered the interpretation of s.79A(1)(c) in Gubbay,<sup>48</sup> although his remarks were obiter since no application under the section had been made. After saying that the Family Court's powers to enforce a s.79 order did not involve a claim for damages for breach of trust, his Honour said<sup>49</sup> that:

"... if it were true, that the wife as trustee had defaulted in carrying out the obligation imposed on her by the order, and in the circumstances that arose as a result of that default it was just and equitable to vary the order, then this Court under that provision has the power and the authority to make such adjustments to the order and to the sums ordered to be paid which would take account of any default on the part of the wife..."

Prior to the paragraph's insertion by the Family Law Amendment Act 1983, the Court would not have been permitted to affect in any way the substantive parts of the s.79 order. However, as a means of side-stepping the possible injustice which could arise where one party was in default in carrying out the terms of an order, the Family Court developed the practice of altering the "machinery provisions" of the original order. Thus in McDonald,<sup>50</sup> the Full Court held that those provisions of the original order dealing with the mode of payment and the effect of any failure to comply with time requirements were not substantive, and it was therefore prepared to waive strict compliance with them. In Fraser,<sup>51</sup> the husband's actions had caused the sale of the matrimonial home to

fall through so that the wife did not receive the equal division of the proceeds that the Family Court had ordered. Eventually, a sale was effected but only at a reduced price. The Full Court directed that arrears of maintenance, the costs of the earlier abortive auction attempt, certain arrears of mortgage payments and the difference between the original estimated value and the actual sale price be deducted from the husband's share.<sup>52</sup> It was pointed out that this direction did not constitute an alteration of the property order but merely "... consequential orders tidying up the situation which has existed because of the husband's machinations and obduracy existing for four years".<sup>53</sup>

#### Section 79A(2)

This sub-section provides that, in the exercise of its powers under sub-section (1),<sup>54</sup> a court "shall have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested".<sup>55</sup>

In summary, it may be stated that the provisions of s.79A, particularly as amended in 1983, enable the Family Court to provide a remedy in situations where a miscarriage of justice has occurred because of one party's success in obtaining a s.79 property order advantageous to himself and inimical to the interests of the other party or where one party's default in carrying out the terms of a s.79 order has led to financial detriment to the other party.<sup>56</sup> In either case, provided that the rights of third parties have not intervened, and provided that the applicant himself has not been guilty of deceit or other unconscionable conduct, nor, in the case of s.79A(1)(a), of undue delay, laches or affirmation, the Court is empowered to rescind the original order or vary its terms according to the justice of the case. It should be noted, however, that the Family Court has no jurisdiction to entertain proceedings under s.79A if they are instituted after the death of one of the parties.<sup>57</sup>

#### Section 85

Where its terms are satisfied, s.85 enables the Court to recapture property which should have been available for distribution.

The section gives the Court power in proceedings under the Act<sup>58</sup> to set aside (or vary)<sup>59</sup> or restrain the making of an instrument or disposition<sup>60</sup> by or on behalf of or by direction or in the interest of, a party which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order. The Court is required to have regard to and protect the interests of a bona fide purchaser or other person interested. The powers exercisable under the section are such that persons who are not parties to or children of the marriage may be affected by the proceedings and by orders made.

The jurisdiction which s.85(1) confers on the Family Court to set aside or restrain dispositions intended to defeat, or likely to defeat, existing or anticipated orders may only be exercised in<sup>61</sup> or after the resolution of separate proceedings under the Act,<sup>62</sup> that is, it is a derivative jurisdiction and there is no power to commence s.85 proceedings in isolation.<sup>63</sup> By its terms, s.85's usefulness is restricted to the circumstances where there is some degree of marital estrangement between the married couple, although this restriction probably has been modified by the insertion of paragraph (ca)(i) in the definition of "matrimonial cause" in s.4(1) by the Family Law Amendment Act 1983.<sup>64</sup> In any case, however, the section provides no wide-ranging power to protect assets generally, for even if paragraph (ca)(i) applies, proceedings will be confined to those "arising out of the marital relationship".

On the other hand, the decision in Anderson<sup>65</sup> to apply the relevant High Court Rules<sup>66</sup> so that third parties could be joined in proceedings, even though they refused to intervene under s.92, made available a valuable remedy to be used when third parties have participated in a scheme to defeat an existing or anticipated order of the Court. Further, the Full Court held that, by applying the provisions of s.15AA of the Acts Interpretation Act 1901 (Cth.), it was possible to make ancillary orders against third parties. Proceedings under s.85 are a matrimonial cause within paragraph (f) in that they are proceedings in relation to any concurrent, pending or completed proceedings of a kind referred to in any of the paragraphs (a) to (eb). Proceedings within paragraph (f) may constitute

a matrimonial cause even though a stranger to the marriage is a party to them.<sup>67</sup>

It is not necessary to show any actual intention to defeat an existing or anticipated order. It will be sufficient that the instrument is, "irrespective of intention" (s.85(1)), likely to defeat an order; that is, it is enough that the disponor as a reasonable person ought to have foreseen<sup>68</sup> that property and maintenance proceedings were probable.<sup>69</sup> Therefore, s.85 can be applied to situations which are not "shams" or "devices".

In ascertaining whether a future order may properly be described as an "anticipated order", the question for the Court to decide is "whether, considering all of the circumstances at the time of the disposition ... an application by (the applicant) at some time, with a consequent order, was objectively to be foreseen or to be expected by (the respondent) as being likely or reasonably probable".<sup>70</sup>

The instrument or disposition impugned may precede the actual institution of proceedings under the Act. The expression "anticipated order" comprehends orders arising out of present or future proceedings,<sup>71</sup> but it certainly cannot be said that an order is anticipated at a time when proceedings under the Act are not contemplated at all,<sup>72</sup> nor will the Court freeze a spouse's assets for a long period of time simply because the other spouse thinks he or she might attempt evasive tactics.<sup>73</sup> Therefore, in the absence of an actual disposition, some evidence of either a specific intention to effect a disposition or a spouse's propensity to make such dispositions is necessary.<sup>74</sup> To establish that a spouse intends to make a disposition at some time in the future obviously will present evidentiary difficulties. The test of causation will readily be established where, for example, a husband has attempted to mortgage the matrimonial home,<sup>75</sup> for the applicant wife can readily argue that the non-accessibility of this particular asset detrimentally affects the orders anticipated in future property proceedings. On the other hand, dispositions which still leave the disponor with substantial remaining assets and which do not affect a particular asset in which the disponor's spouse is interested do not cause the probable defeat of later financial orders.<sup>76</sup>



It will not suffice that, for the purposes of s.85(1), the offending act having taken place, an order is subsequently anticipated and it subsequently appears that the order is likely to be defeated by the earlier impugned act. Any other interpretation would leave it open to an applicant to impugn very old transactions and dispositions effected at a time when orders were not anticipated and where disharmony may not even have arisen. On the other hand, a plan to avoid financial responsibilities made early in marriage will be reasonably effective, as the result in Ascot Investments Pty Ltd. v. Harper and Harper<sup>77</sup> indicates.

The death of a disponor effectively prevents any new property or maintenance proceedings from being instituted under the Act so it is possible for a spouse to "empty his or her estate" before death by disposing of assets to persons outside his or her immediate family, thereby frustrating dependants' maintenance claims against the estate under State Testator's Family Maintenance legislation,<sup>78</sup> except in New South Wales, where sections 21 to 29 of the Family Provision Act 1982 empower the Supreme Court of New South Wales to deal with certain "prescribed transactions". At present, post-death obligations contained in the State legislation are notoriously easy to evade, and, since, except in New South Wales, there are no State provisions equivalent to s.85 to enable the setting-aside of dispositions effected during the disponor's lifetime,<sup>79</sup> there is a limit to the transactions that a surviving spouse can challenge. However, death does not prevent existing property or maintenance orders being enforced against the deceased's estate under s.82(2), s.82(3), s.87(5) and s.105(3), and existing maintenance orders may be varied against the estate of the deceased.<sup>80</sup> In either of these proceedings to vary or enforce orders, s.85 can be used to set aside dispositions effected prior to the disponor's death. Maintenance orders made since 25th November, 1983, when the Family Law Amendment Act 1983 came into operation, cannot be prospectively enforced against deceased estates (s.82).

Because of the insertion of s.79(8)<sup>81</sup> by the 1983 amendments, pending or completed proceedings will not abate on the death of a party, and, in these circumstances, dispositions made before death can now be caught by s.85.

According to some decisions, there must be a nexus between the impugned act and the defeat or likely defeat of the order,<sup>82</sup> but in Heath; Westpac Banking Corporation,<sup>83</sup> the Full Court questioned whether such a causal connection is in fact needed. Since the making of the mortgage by the husband was in itself sufficient to defeat the anticipated order in favour of the wife under s.79, the Court preferred not to give a decided view on the matter in the case before it.

Section 85 envisages the making of orders against third parties. While the constitutionality of the orders is therefore suspect, it is submitted that the High Court would probably uphold the section as intra vires despite its applicability to third persons because, inter alia, it is socially desirable for the Family Court to be able to prevent the evasion of family or financial responsibility. This view is reinforced by the fact that, under s.79, orders can be made directly against third parties in cases of "shams" or "devices" set up to evade the provisions of the section,<sup>84</sup> or indirectly against a third party who is legally controlled by a party to the marriage.<sup>85</sup> Under s.85, it appears that, in appropriate circumstances, the Court may order a transferee, a stranger to the marriage, to re-convey property or discharge a mortgage over it even if he or she were a bona fide purchaser for value.<sup>86</sup> An application seeking such an order may be made in relation to any proceedings under the Act, unlike the position prior to the 1983 amendments, for then proceedings had to relate to a matrimonial cause as defined in s.4(1) of the Act, paragraphs (a) to (e).<sup>87</sup>

Nygh J. in Heath and Heath; Westpac Banking Corporation<sup>88</sup> considered the meaning of "bona fide purchaser"<sup>89</sup> and "other person interested" which appear in s.85(3). He adopted the definition of the words "purchaser for valuable consideration" given by Goff J. in Re Windle,<sup>90</sup> that is, that they do not mean "... a purchase in the strict sense of a contract of purchase and sale, but (they) postulate a person who in the commercial sense provides a quid pro quo".<sup>91</sup> While the bank had been a purchaser for good consideration,<sup>92</sup> it had not acted bona fide, for it had notice of the wife's property claim and a search of title would have revealed her caveat. There are, however, dicta to the effect that in the absence of being put on notice and

having made due search, a bank is not obliged to enquire into the marital status of customers before making loans. The importance of the placement of a caveat on the title to property to protect equitable interests becomes apparent, therefore. Even a defective caveat has the effect of temporarily preventing the holder of the legal title to Torrens land from selling or mortgaging the property.<sup>93</sup>

As to the phrase "other person interested", Nygh J. conceded that in the strict grammatical sense the words included any person who has acquired an interest in the property other than as a bona fide purchaser.<sup>94</sup> Therefore, they would cover a donee as well as a purchaser with notice.<sup>95</sup> However, on this view, the specific reference to "bona fide purchaser" would be meaningless, for all persons acquiring an interest, whether bona fide or not, would be entitled to the same protection. To include the word "purchaser" in the phrase, as Baker J. did in Abdullah,<sup>96</sup> would also do violence to the words of the section by virtually ignoring the concluding four words, "or other person interested", contrary to the rules of statutory interpretation, which do not permit a court to ignore the ordinary and grammatical meaning of words of a statute. However, Baker J. found that the purported sale by Abdullah was a sham, so Mr. Jaya was not even "a person interested". The word "interest", Nygh J. concluded, must be interpreted to indicate the acquisition of an interest, not merely an involvement or a curiosity. A sham transaction<sup>97</sup> confers no interest. While the bank in Heath<sup>98</sup> was clearly "a person interested", for it stood to lose \$26 000 which it had advanced on the second mortgage, it was not "a bona fide purchaser", and its interest was postponed to that of the wife.

In Whitaker,<sup>99</sup> Nygh J. suggested that, in certain circumstances, s.85 permits the Court to set aside a subsequent transfer by a third party to whom the respondent has transferred property.

The Court has an injunctive jurisdiction under s.85(1). It may "restrain the making of a disposition by, or on behalf of, or by direction of, or in the interest of a party". Since s.114(3) may be used to restrain a disposition by a third party in a case not falling directly within the injunction provisions of s.85(1),

it reinforces this jurisdiction. It has been suggested that s.85(1) may give a wider power to restrain third parties than would be available under s.114(3). Suppose, for example,<sup>1</sup> directors of a company, in which the husband has a large shareholding comprising his major asset, acting in the husband's interest, propose to allot a large number of additional shares to a trust in which the husband has a contingent interest, but not a present interest, so as to swamp the husband's shareholding and reduce its value. Section 85(1) would give the Court injunctive powers sufficiently wide to restrain the directors from making such an allotment, but in the light of the decision in Ascot Investments,<sup>2</sup> it is questionable whether s.114(3) does.

There is some authority for the proposition that the Court's powers under s.85 are not defeated or superseded by subsequent bankruptcy,<sup>3</sup> but this is one of the matters at present under review of the Australian Law Reform Commission's General Insolvency Inquiry.<sup>4</sup> It has also been held that while the Court has power under s.85 to set aside an assignment of property to a trustee under Part X of the Bankruptcy Act 1966 (Cth.),<sup>5</sup> it does not have a power to upset any change of ownership resulting from an exercise of jurisdiction by the Bankruptcy Court.<sup>6</sup> However, the Family Court, being a court of Federal jurisdiction, has an associated jurisdiction to decide matters arising under other Federal legislation such as the Bankruptcy Act 1966 (Cth.)<sup>7</sup> in appropriate circumstances.

The contrasting decisions in Page (No.2)<sup>8</sup> and Wallmann<sup>9</sup> should be noted. In the former case, it was assumed that a husband who has no property cannot be the subject of an application for a property order. The husband had no assets by reason of their having been transferred to the Official Receiver in Bankruptcy pursuant to a bankruptcy order. In the latter case, Murray J. held that it would "... seem to be manifestly unjust that a party should lose the right to claim against any possible surplus (in the bankrupt's estate) by virtue of the trustee having the capacity to strike out that party's application for property settlement on the sequestration of the other spouse's estate prior to any surplus being ascertained". The decisions appear to be inconsistent and no clear law can be stated, but on the authority of Page (No.2)<sup>10</sup>

it may be asserted that an applicant who is an undischarged bankrupt is still able to pursue a claim under s.79.<sup>11</sup>

As far as protection of a bona fide purchaser's interests, as provided for by s.85(3), is concerned, it is open to the Court to decide to do nothing more than grant the party leave to intervene in the proceedings.<sup>12</sup> Even if it is submitted by the claimant that the involvement of the third party is a sham, it may be appropriate to give notice to a third party of the application and the material submitted in support in order to give that party an opportunity to seek leave to intervene.<sup>13</sup> If the Court is unable to formulate any order for the protection of the purchaser or other interested party, it does not follow that it lacks jurisdiction to make any order under s.85(1).<sup>14</sup> On the other hand, the Court may decide that no order should be made under the section. In Abdullah,<sup>15</sup> Baker J. was of the view that, in normal circumstances, the Court in the exercise of its jurisdiction would be loath to set aside a transaction entered into with a bona fide purchaser for full value in the ordinary course of business. If the respondent still has possession of the proceeds of sale, an injunction can be granted under s.114(1) to restrain any dealing in them.<sup>16</sup> If, on the other hand, the proceeds of the sale have been dissipated and restitutio in integrum is no longer possible, no order should be made, as a matter of discretion. His Honour did imply, however, that a dealing with the matrimonial home, defeating the occupancy of the applicant spouse and the children of the marriage, may be treated as an exception to the general proposition.<sup>17</sup>

### Summary

Where assets have been dissipated or alienated by the date of a s.79 application, the Court may remedy this "emptying" of the pool of assets by setting aside under s.85 a disposition which has had the effect of defeating a reasonably foreseeable property order,<sup>18</sup> therefore refilling the pool of assets before proceedings under s.79 are continued, or by notionally including the dissipated or alienated asset in the pool of assets and then considering that asset as already transferred to the disponent-spouse as part of his or her eventual share.<sup>19</sup> Alternatively, the Court may disbelieve

the evidence of an allegedly penniless spouse, and make property orders against him or her.<sup>20</sup>

### SECTION 85A<sup>21</sup>

Section 85A, which was inserted by the Family Law Amendment Act 1983, substantially re-enacts the provisions of s.86(2) of the Matrimonial Causes Act 1959 (Cth.).<sup>22</sup> The section empowers the Family Court, in proceedings under the Act, to make such order as it considers just and equitable with respect to the application of the whole or part of the property dealt with by ante- and post-nuptial settlements made in relation to the marriage (s.85A(1)). The matters in s.79(4), so far as they are relevant, are expressly included for consideration (s.85A(2)).

It appears that the purpose of s.85A is to permit the Court to deal, to a certain extent, with assets settled by way of discretionary trusts.<sup>23</sup> Whether the trustee is a party to the marriage or not a trust which makes provision for the future needs of a family comes within the meaning of a "nuptial settlement" in s.85A. Where a party has an interest which cannot be transferred and its value depends on future circumstances over which that party may have little or no control, s.79 has a limited usefulness.

Because of the reference in s.85A(1) to "proceedings under this Act", it appears that an application under the section may be made in isolation from (or in conjunction with) other proceedings under the Act; proceedings need not be ancillary, unlike the position as far as s.85 proceedings are concerned.<sup>24</sup> Even if the proceedings do not constitute a "matrimonial cause" within paragraph (ca) or (f) of the definition in s.4(1), the Court has the jurisdiction and the power to entertain the proceedings (s.31(1)(d) of the Act).<sup>25</sup> Therefore, trustees, even though they are neither parties to nor children of the marriage, may fall within the terms of the section, subject to the limits set down below.<sup>26</sup>

Interpretations of the section's predecessors in legislation<sup>27</sup> gave a wide interpretation to the word "settlement". In Prinsep v. Prinsep,<sup>28</sup> it was held that a settlement "... should provide for the

financial benefit of one or the other or both of the spouses and (make) reference to their married state". An absolute and unqualified transfer of property will not constitute a settlement<sup>29</sup> unless the disposition makes continuing provision for periodical payments.<sup>30</sup> An outright gift would have the effect of providing for a spouse's future needs but it is not a settlement: "... (t)he decisive factor is the manner in which the disposition seeks to make the provision".<sup>31</sup> The High Court in Dewar v. Dewar<sup>32</sup> held that, in the context of matrimonial property, the concept denotes a disposition importing "... a fetter upon the alienation of the entirety" even though the settlement instrument creates "... no trusts, no successive interests and no express limitations tending against mere alienation". However, it has been held that there is a settlement on the parties to a marriage when they are named as objects of a discretionary trust.<sup>33</sup> In Compton v. Compton,<sup>34</sup> Marshall J. suggested that a settlement on parties to a marriage may exist where, without being given any interest over the settlement, the parties are given powers over the disposal of the settled property.

The settlor and his motive for making the settlement are immaterial,<sup>35</sup> and a settlement, in the relevant sense, may be created orally or arise by operation of law.<sup>36</sup> It must, however, be made in contemplation of the parties' marriage before it can be termed an ante-nuptial settlement.<sup>37</sup> To constitute a post-nuptial settlement, it must be undertaken on the basis that the marriage is going to continue<sup>38</sup> if it is not to be ruled invalid as being contrary to public policy.

The Family Court's power to make orders with respect to the property dealt with by the settlement concerns the application of the property; it is not confined to the interests of the parties under the settlement. Discretionary trustees may have their discretions overridden<sup>39</sup> and they may be ordered to apply a fixed proportion of the income in favour of a nominated party.<sup>40</sup> Forfeiture provisions in protective trusts have been overridden<sup>41</sup> and non-fiduciary powers of revocation or appointment have been suspended.<sup>42</sup>

It appears that in making orders for the application of all or

part of the property dealt with by a settlement, the Court may adversely affect the rights and entitlements of volunteer-strangers, provided that those rights and entitlements are remote and contingent.<sup>43</sup> Hardingham and Neave express the view<sup>44</sup> that such a construction is necessary by reason of the limitations imposed by the Constitution: a law which permitted the Court to alter or destroy the rights of third parties (other than remote and contingent rights) could not be said to be a law with respect to marriage within s.51(xxi).

If the rights accorded to children under the settlement are withdrawn for some reason by the Court's order directing the application of the property dealt with by the settlement, the decision in Meller v. Meller<sup>45</sup> suggests that they must be compensated by some additional advantage which, at a minimum, leaves them substantially as well secured and protected as they were in the original settlement.<sup>46</sup>

Section 85A is widely cast by the legislation in order to provide the Family Court with a means of substantially re-arranging the terms of discretionary trusts which have been designed to defeat the effective operation of the Court's jurisdiction under s.79 of the Act. However, the restrictive judgments of the High Court in Re Ross-Jones and Marinovich; ex parte Green<sup>47</sup> suggest that third parties may not be made the direct subject of orders of the Family Court and that the operation of the section is as a result limited.<sup>48</sup>

#### SECTION 114<sup>49</sup>

Since a s.114 injunction is a valuable means of controlling conduct with economic consequences, in this chapter only the jurisdictional bases of s.114(1) and s.114(3) will be analysed. The particular situations in which the provisions may be used and the extent to which they can remedy conduct resulting in the diminution of assets will be discussed in Chapter Six, particularly Part F.

Section 114 delimits the injunctive power of the Family Court. An injunction<sup>50</sup> is an order or decree by which a party to an action



is required to do, or refrain from doing, a particular thing. Injunctions are either restrictive (preventive) or mandatory (compulsive). They therefore provide a valuable means of protecting property interests against acts of dissipation or alienation.

As regards time, injunctions are either interlocutory<sup>51</sup> (interim) or perpetual. A perpetual injunction is granted only after the applicant has established his right and the actual or threatened infringement of it by the respondent; an interlocutory injunction may be granted at any time after the writ is issued to maintain things in statu quo. The Court must be satisfied that there is a serious question to be tried at the hearing and that on the facts the applicant is probably entitled to relief.<sup>52</sup> Once granted, an injunction is enforced by committal for contempt of court for any breach.

Unlike the position in England, where, although there may be statutory limits on their jurisdiction, there are no constitutional restraints imposed on the courts,<sup>53</sup> s.114 is limited in its operation by the terms of the Constitution of the Commonwealth of Australia.

The words of s.114 make it clear that the power granted by the section is available only if the Family Court is exercising jurisdiction under the Family Law Act, although, as explained below, s.114(1) and s.114(3) have different jurisdictional bases. As Gibbs CJ. pointed out in Re Ross-Jones and Marinovich; ex parte Green,<sup>54</sup> "... the section means what it says; it confers power which the Court may exercise only if it already has jurisdiction - it does not confer jurisdiction".<sup>55</sup> Section 114(1) grants the power to order an injunction only in proceedings of the kind referred to in paragraph (e) of the definition of "matrimonial cause" in s.4(1). Section 114(3) applies when the Court is exercising jurisdiction under the Act in any proceedings other than those to which subsection (1) applies. The provisions cannot be extended by resort to the so-called inherent jurisdiction; such inherent jurisdiction as the Family Court may have cannot go beyond protecting its function as a Court constituted within the limited jurisdiction afforded by the Act.<sup>56</sup>

As the Full Court indicated in Sieling, "... (t)he power to grant injunctions is, of course, a discretionary power, not to be exercised lightly".<sup>57</sup> Each case must be decided according to its own facts and circumstances.<sup>58</sup> Further, the Family Court, in deciding both whether to make an order or injunction under s.114 and the terms of any such order or injunction, must have regard to the four principles set out in s.43.<sup>59</sup>

Ordinarily, the Family Court upholds the principles of equity when exercising its discretion to make an order or injunction under s.114. Thus in McCarney,<sup>60</sup> the Full Court upheld the principle that an application for an injunction must be made bona fide and in Aldred,<sup>61</sup> Nygh J. was prepared to bar the grant of an injunction because the applicant had been guilty of laches. However, Murray J. in an obiter statement in Thompson<sup>62</sup> indicated that in certain circumstances she would not necessarily regard the equitable defenses of acquiescence and misleading conduct as being sufficiently strong to displace the necessity for protecting a wife in respect of support and shelter for herself and her children. Such a departure from established equitable principles<sup>63</sup> indicates the overriding nature of the provisions set down in s.43. It is clear from the foregoing that considerations of the conduct of both the applicant and the respondent will be relevant when the Family Court is deciding whether to exercise its discretion to issue an order or injunction to restrain the alienation or dissipation of assets in which the applicant claims to have legal rights.<sup>64</sup> In exercising its discretion, the Court must balance the hardship to each party and frame its order in such a manner as to impose no further restriction than is necessary to achieve protection of the applicant's interest.<sup>65</sup> An injunction will not be granted if it is felt that there is no real risk of the property being disposed of.

According to O.12,r.1 of the Family Law Rules, in an urgent case on an application made ex parte, the Court may make an order until a specified time or until a further order is made. However, in ex parte proceedings there is a particularly onerous duty of full disclosure resting on the applicant.<sup>66</sup>

Section 114(1)

Section 114(1) is an "independent power", for the power under it can be exercised without regard to any other form of matrimonial relief. By definition (e) of "matrimonial cause", to which this sub-section relates, proceedings between the parties to a marriage for an order or injunction in "circumstances arising out of the marital relationship"<sup>67</sup> constitute a "matrimonial cause" in their own right.<sup>68</sup> Where accelerated relief is not open to the parties and the proceedings cannot be brought within definition (ca)(i) of the definition of "matrimonial cause", namely, "proceedings arising out of the marital relationship", s.4(1)(e) enables the Family Court to grant injunctions unconnected with and prior to principal relief proceedings. While it is clear that s.4(1)(e) may not be used to alter property rights,<sup>69</sup> it is now accepted that there is a liberal injunctions jurisdiction by which the Family Court may keep safe property which is at risk of disposal by a party, or which may be the subject of a prior Supreme Court order which could pre-empt Family Court jurisdiction. Section 114(1) gives a court exercising powers under the Act the power to make both orders and injunctions.

Although it took the Family Court some time to work out a satisfactory relationship between s.114(1) and s.79,<sup>70</sup> its approach has always been to regard each section as involving a separate head of power which may at times overlap with the other but which is nevertheless basically distinct.<sup>71</sup> The Courts have always based s.114(1) squarely upon matrimonial cause (e) and s.79 squarely upon matrimonial cause (ca),<sup>72</sup> and they have been diligent in their attempts to prevent the limitations pertaining to s.79 from being circumvented simply by recourse to s.114(1).

As drafted prior to the 1983 amendments and as interpreted by the Family Court, s.114(1) had two main applications in the property context. First, it was used to secure exclusive occupancy of the home for a party to the marriage pending the institution and resolution of property proceedings.<sup>73</sup> Secondly, and more importantly as far as the present study is concerned, it empowered the Court to restrain a party to the marriage from encumbering, alienating or facilitating the alienation of assets

in respect of which s.79 proceedings might later be taken. That is, it operated not only as an exclusive possession provision but also as a "freezing" provision. However, such an injunction had to be directed against a spouse and not against third parties such as the Registrar-General of Titles<sup>74</sup> or a company.<sup>75</sup>

Hardingham and Neave<sup>76</sup> express the view that although s.114(1) was re-worded by the amending legislation of 1983, its substance as far as the property jurisdiction is concerned remains unaltered, since paragraphs (e) and (f) of s.4(1) refer respectively to "an injunction in relation to the property of a party to the marriage" and "an injunction relating to the use and occupancy of the matrimonial home". However, its application appears to have been limited.

Under the re-worded paragraph (ca) of the definition of "matrimonial cause" in s.4(1) of the Act, it is provided that s.79 proceedings may be instituted on condition that they are "proceedings arising out of the marital relationship" (paragraph (ca)(i)). Previously, only be recourse to s.114(1) could one party to the marriage seek to restrain the other from selling, mortgaging, leasing or otherwise dealing with property during the period from the breakdown of the marriage until proceedings could be commenced for principal relief. However, s.114(1) proceedings, in accordance with paragraph (e) of the definition of "matrimonial cause", could then and may still only be instituted in "circumstances arising out of the marital relationship".

As soon as property proceedings are instituted, the Court, in exercise of its powers under s.114(3), may grant injunctions in aid of its property jurisdiction, as will be explained below, and it may also counter conduct likely to defeat any property order arising out of the proceedings. There may still be application for s.114(1), however. For example, there may be a delay in the institution of property proceedings<sup>77</sup> and the Court may be asked to regulate conduct under s.114(1) in the interim. Moreover, some property may fall outside the definition of property as "arising out of the marital relationship" in paragraph (ca)(i)<sup>78</sup> or, even after property proceedings have been instituted, the Court may resort to s.114(1) pending their ultimate resolution.

The interpretations of the phrase "arising out of the marital relationship" which appears in s.4(1)(e) have already been canvassed in Chapter Four, Part B, of this study. In the property context, it appears that proceedings fall within paragraph (e) when their purpose is the resolution of a dispute as between the parties concerning rights to the use or possession of property, other than temporary rights, pending the institution of property proceedings under s.4(1)(ca).

Section 114(1) confers general jurisdiction upon the Family Court to "make such order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate". It prefaces the types of injunction which may be granted or instances in which injunctions may be granted with the word "including". As a result, orders and injunctions may be granted under s.114(1) in circumstances other than those specified. For example, they may be used to direct a party not to dispose of certain property when he actually receives it;<sup>79</sup> not to exercise a power in such a manner as to adversely affect the applicant;<sup>80</sup> or not to remove property from the jurisdiction.<sup>81</sup>

Although orders and injunctions cannot be directed against third parties in s.114(1) proceedings<sup>82</sup> unless the third party has assisted a party to the marriage to defeat rights arising under the Act by exercising its legal rights not bona fide for its own purposes but for the sole purpose of assisting one spouse to disadvantage the other,<sup>83</sup> third parties may be indirectly affected by them.<sup>84</sup> This restriction is necessary because, by the terms of s.4(1)(e), the proceedings must be between the parties to the marriage in order to relate the provision to the "marriage" power in s.51(xxi) of the Constitution.

### Section 114(3)

A proceeding under s.114(3) constitutes a "matrimonial cause" within paragraph (f) of the definition of that phrase contained in s.4(1).<sup>85</sup> For the Court to assume jurisdiction under s.114(3), it must have before it proceedings other than those which fall within s.114(1), which is based on paragraph (e) of the definition. Moreover, to come within paragraph (f), the proceedings in question

must bear an appropriate relationship to other proceedings of the kind referred to in the definition.<sup>86</sup> Once it has jurisdiction under s.114(3), the Court may grant an injunction as a step in the making, completion or enforcement of those proceedings.<sup>87</sup>

If the proceedings which are supported by an injunction are dismissed for any reason, then the injunction itself must be discharged.<sup>88</sup>

An injunction under s.114(3) may be either interlocutory or permanent in form, but, in contrast with the position under s.114(1), the Family Court has no power under s.114(3) to make orders as well as injunctions. In appropriate circumstances, the Court may grant an interlocutory injunction under s.114(3) in order to restrain the disposal of or other dealings in particular property pending the hearing of property proceedings commenced under s.78 and s.79,<sup>89</sup> such an injunction being an aid to the Court's jurisdiction.

The particular value of the relationship of s.114(3) to s.4(1)(f) is that there is no specific requirement in the paragraph that the proceedings in question be between the parties to the marriage, so the section is useful as a means of granting injunctions against third parties, including family companies and discretionary trusts. However, the High Court, in a number of decisions, has opposed any idea of directly restricting the rights of third parties.<sup>90</sup>

### Summary

It may be concluded that, while the Family Law Act 1975 provides the machinery by which financial misconduct may be remedied in appropriate cases, there is very limited scope to affect the rights of third parties. Limitations of a jurisdictional nature also inhibit the effectiveness of the Family Court.

In the next chapter, specific types of financial misconduct and the remedies, if any, that are available will be discussed. Also, possible legislative reforms will be described.

CHAPTER SIXFINANCIAL MISCONDUCT RECOGNIZED AS BEING RELEVANT BY THE FAMILY COURT IN ITS DISCRETION TO ADJUST PROPERTY INTERESTSPART ATHE JURISTIC BASIS FOR TAKING FINANCIAL MISCONDUCT INTO CONSIDERATION

Prior to the reforms to divorce law that began in the 1970's, it was necessary to show that a spouse had committed a matrimonial offence before a divorce would be granted. As Finlay<sup>1</sup> points out, "(d)ivorce was conceived of on the basis of a remedy granted at the suit of one party to a marriage, whose legal rights had been infringed by the other". Under this system,<sup>2</sup> the parties' conduct was of immense importance. If the husband were the guilty party in divorce proceedings, he would be liable to compensate the wife for the loss which would otherwise flow by reason of her losing the right to support which a wife enjoyed. Conversely, if she were the guilty party, she would not be eligible for such compensation and would thus in principle no longer be entitled to any form of support from her former husband.<sup>3</sup> This principle came to be modified, first by the recognition that even a guilty wife should receive a so-called "compassionate allowance" so as to prevent her from being forced into the streets to starve,<sup>4</sup> then, secondly, by the doctrine that a wife would only be denied maintenance if her conduct could be described by such epithets as "disruptive", "intolerable" or "unforgiveable".<sup>5</sup>

During the first part of the present century, the divorce perspective underwent a transformation: divorce was coming to be seen as

"... a misfortune rather than as a manifestation of fault calling for retribution. The notion of the destruction of marriage came to give way to the more complex view of the breakdown of the matrimonial relationship. This new concept marked a transition from the rather simplistic view of a unilateral

event and brought with it the possibility of recognising a principle of mutuality in the deterioration of a matrimonial relationship".<sup>6</sup>

It was not until 1966, however, that the Commission appointed by the Archbishop of Canterbury<sup>7</sup> and the English Law Reform Commission<sup>8</sup> expressed the view that the only possible basis for divorce was the notion of irretrievable breakdown of marriage. The Law Commission recommended that divorce legislation be drafted in such a manner as to allow "the empty legal shell of a broken marriage" to be destroyed with the minimum bitterness, distress and humiliation.<sup>9</sup> It realised that, in fault-based divorce proceedings, it is difficult to establish the true cause of the disintegration of the marital union and to properly allocate blame.<sup>10</sup> The disintegration of the marriage in its turn leads to a reduction of the joint responsibility which is the basis for the conjugal relationship. The longer a union has lasted, the more difficult it is to establish the fault which was the cause of its eventual failure. As Ormrod J. has pointed out,<sup>11</sup>

"(While) the forensic process is reasonably well adapted to determining in broad terms the share of each party for an accident on the road or at work ... it is much too clumsy a tool for dissecting the complex interactions which go on all the time in a family. Shares in responsibility for breakdown cannot properly be assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned....".<sup>12</sup>

In any case, the fault might well be the consequence of the pre-existing failure of the union.<sup>13</sup> It was the view of the Law Commission that to use evidence of separation over a certain period of time as a basis for awarding a decree of dissolution of marriage would overcome such problems. However, the Divorce Reform Act 1969 (Eng.)<sup>14</sup> incorporated both fault and breakdown grounds as the basis for the dissolution of marriage.<sup>15</sup> The Family Law Act 1975 (Cth.), on the other hand, has the sole ground of irretrievable breakdown<sup>16</sup> (s.48(1)). To satisfy the requirements of s.48, there must be evidence of an intention to separate followed by the parties'



living "separately and apart for a continuous period of not less than twelve months immediately preceding the date of the filing of an application for dissolution of marriage" (s.48(2)).<sup>17</sup> The case of the persecuted spouse requiring immediate protection was taken care of by the provision of an injunctive jurisdiction under s.114 of the Act. Proof of breakdown in Australia is based, therefore, on observable conduct of "... neutral moral connotation".<sup>18</sup>

Harrison has summarised the results of the introduction of the new divorce legislation in the following manner:

"... (N)o-fault laws have altered the property and other entitlements of divorcing men and women by removing the advantage or disadvantage provided by the commission of a matrimonial offence. The earlier simplistic formula of the 1950s and 1960s was that proven guilty conduct of one party, such as desertion or adultery, was the cause of the breakdown of the marriage. Everything that followed, as a result of that behaviour (more importantly the custody of children and the allocation of property), was considered to be linked to it. However this principle was gradually modified by legislative provisions which required decisions involving children to be made with their best interests as the paramount consideration, and property settlements to be just and equitable. The no-fault premise of the Family Law Act was therefore not so much a radical step as the end point of an evolutionary movement".<sup>19</sup>

The Australian community readily accepted the abolition of matrimonial fault as a ground for the dissolution of marriage. Gallup Polls conducted during 1973 showed that 79% of those polled supported the proposition that a divorce should be granted if the husband and wife were to inform the court that their marriage had broken down.<sup>20</sup> The granting of a divorce after twelve months separation was favoured by 85.2% of the respondents to that poll.<sup>21</sup> Few submissions were forthcoming supporting the retention of fault grounds and opposing the basic change to divorce law which ultimately became embodied in the Family Law Act 1975.<sup>22</sup>

Since the Family Law Act 1975 came into operation, however, there have been calls for the re-introduction of fault-based divorce.<sup>23</sup> or, at the very least, for the consideration of fault in the adjudication of ancillary matters. For example, in the survey of property and income distribution on divorce in Australia recently conducted by the Australian Institute of Family Studies, a number of respondents expressed the view that they believed their property share should have been greater because their spouse had left them or in some other way had brought the marriage to an end.<sup>24</sup> In an address given to an Australian Labor Lawyers' dinner in Adelaide, the Hon. John Bray, formerly Chief Justice of South Australia, pointed out<sup>25</sup> that there is a similarity between the provisions of the Partnership Act and the provisions of the Family Law Act which are concerned with the consequences of dissolution in that, in both cases, considerable attention is given to the contribution of each of the parties to the mutual assets. While damages sustained by one of the partners through breach of the partnership contract is taken into account in the winding-up after the dissolution of a partnership, this is not the case with a matrimonial partnership. As a consequence, many divorced people feel a deep sense of injustice, believing that their assets have been "... ripped away from them arbitrarily simply because their spouse has decided that he or she would be happier apart".<sup>26</sup> Even if they think a judge has mishandled a case, people "... will often put up with an adverse decision on the facts after due hearing if they think a proper yardstick has been used".<sup>27</sup>

In 1980, the Senate Joint Select Committee, which presented a report on the operation of the Family Law Act, recommended that s.75(2)(o) of the Act be repealed and the following provision be inserted:

"Any fact or circumstance, including any conduct of the applicant for maintenance towards the respondent and relevant to the marital relationship, which, in the opinion of the Court, the justice of the case requires to be taken into account".<sup>28</sup>

The recommendation was strenuously opposed by Senator Durack in a speech to the Senate<sup>29</sup> and, in 1983, a proposed amendment to

s.75(2)(o), by which a court, in dealing with an application for maintenance or property adjustment, should take into account "any fact or circumstance, including any conduct of the parties to the marital relationship, which in the opinion of the court the justice of the case requires to be taken into account", <sup>30</sup> was defeated without a division of either House being called. <sup>31</sup>

In 1982, Mr. Justice Opas of the Family Court was murdered and acts of violence were directed at other Judges of the Family Court. These events caused the Family Court Judges and prominent practitioners who were present at a symposium, "Fault and Violence in the Family Court", which was held at Monash University on 5th September, 1984, <sup>32</sup> to reach the conclusion that "... somehow the ventilation of fault which occurred under the old system helped relieve emotional pressure which would otherwise find more damaging outlets". <sup>33</sup> However, Professor David Hambly, Commissioner for the Australian Law Reform Commission's Matrimonial Property Inquiry, in a speech to the Second National Conference of the Australian Association of Marriage and Family Counsellors, expressed the view that the violent events should not be seen as symptomatic of a general dissatisfaction with the operation of divorce law in Australia. <sup>34</sup>

In its Discussion Paper, Matrimonial Property Law (June, 1985), the Australian Law Reform Commission gives compelling reasons against the re-introduction of fault considerations to the law of divorce in Australia: <sup>35</sup>

"What is fault? Marriage is the most complex and intimate of relationships. Each spouse sees the marriage from his or her own perspective; the perspectives are bound to differ, particularly in retrospect. It should not be assumed that the law is capable of establishing, after a form of inquest into the marriage, an objective explanation for its demise and an allocation of responsibility for it. The factors that might bring a matrimonial relationship to an end defy categorization. ... Considerations of this kind influenced the decision of Parliament to abandon the old matrimonial

fault basis for divorce.<sup>36</sup>

Impeding conciliation. To allow imputations of fault in the breakdown of a marriage to influence property and financial matters would revive many of the worst features of the law . . . . If the law gave separating spouses an incentive to accuse each other of marital wrongdoing unrelated to the financial aspect of marriage, there would be a risk in every case of an exchange of allegations which would aggravate the rupture of the relationship, with damage to the spouses' self-esteem and (in many cases) to their continuing relationship as parents with shared responsibility for children . . .".<sup>37</sup>

Unlike some United States legislation,<sup>38</sup> the Family Law Act 1975 (Cth.) does not specifically exclude considerations of misconduct. It might be thought, however, that considerations of misconduct are implicit in some of the provisions, namely s.75(2)(o) ("any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account");<sup>39</sup> s.79(2) ("the court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order"); s.79(4)(a) and (b), which consider contributions made to the acquisition, conservation or improvement of any of the property of the parties; and s.79(4)(c), which considers "the contribution made by a party to the marriage to the welfare of the family . . . including any contribution made in the capacity of homemaker or parent".

Consonant with the intention of the legislators, who omitted the word "conduct", which had appeared in s.84 of the Matrimonial Causes Act 1959 (Cth.), when s.75 and s.79 of the Family Law Act 1975 were enacted, most judges in early decisions of the Family Court rejected arguments that misconduct should be considered relevant,<sup>40</sup> for they indicated that a property distribution should not be seen as a means of carrying out retribution for matrimonial fault.<sup>41</sup> Gray takes a broader, and, it is submitted, a realistic perspective on the matter:

"No weight should be given to matrimonial misconduct

which has exerted no economic influence, since it is not a valid function of the matrimonial law to punish wrongdoing by the confiscation of rights 'earned' through contributions, or to reward virtue by the award of a solatium or bonus".<sup>42</sup>

In Soblusky,<sup>43</sup> which was decided in the first year of the operation of the Family Law Act, the Full Court unanimously rejected a submission that the terms of s.75(2)(o) permit the Court to consider the marital history as such of the parties to a marriage but it stated obiter that "... facts or circumstances of a broadly financial nature"<sup>44</sup> would be relevant in an appropriate case. That case concerned an application for maintenance, but, in Ferguson,<sup>45</sup> the Full Court held that it would be proper for the Family Court, in determining a property application, to take into consideration conduct which "... has produced consequences which have diminished or destroyed the property of the parties" or the effect of which has been "... to cause the recipient of the conduct to act in a way which has resulted in the value of the property being diminished or in the property being lost to the parties".<sup>46</sup>

It is submitted that this is the correct approach to the interpretation of s.75(2)(o). All other paragraphs in S.75(2), except s.75(2)(1), are concerned with financial matters. As a major purpose of the Family Law Act was to eliminate allegations of matrimonial fault from the grounds for divorce, it was unlikely that Parliament intended, in the general words of s.75(2)(o), to retain the concept of matrimonial fault in relation to property and maintenance.<sup>47</sup> The Australian position, therefore, sharply contrasts with that in England, where the legislation retains a fault basis,<sup>48</sup> and where there does not seem to be wide recognition of the fact that

"(m)atrimonial misconduct should become a relevant consideration only if and to the extent that it has resulted in a defective or negative contribution to the economic welfare of the family, and is thereby causally connected with the acquisition, extent or value of the matrimonial assets".<sup>49</sup>

It is submitted that to take into consideration conduct which has had an impact on the finances of the parties to a marriage<sup>50</sup> is the only just approach in a system, such as that established by Australian legislation, whereby an application may be made for property adjustment on the basis of past contribution or future need. It would not be just to deny a party compensation for property interests earned through past contribution because the assets to which the contribution has been made have been disposed of or diminished in value by the other spouse.<sup>51</sup> Nor would it be just to deny future maintenance<sup>52</sup> to a party, particularly a parent with responsibility for the care and custody of infant children, because the other spouse has unreasonably reduced the pool of financial resources from which the maintenance would otherwise have come, or impaired his or her future capacity to meet maintenance payments.<sup>53</sup>

The following comment from the judgment of Carmichael J. in Barkley v. Barkley<sup>54</sup> is apposite:

"Financial circumstances of the parties, their means and resources, capacities to earn, entitlements to Social Services benefits, are the matters to which the court has to look. When one party has stolen, or borrowed and squandered, the funds of the other party, the economic consequences of that conduct is surely a matter to be considered in adjusting their proprietary rights according to what is just and equitable. The conduct giving rise to the relevant economic consequence may be a crime, a tort, or simply a right to claim a civil debt. I cannot see that because a result very relevant to the means of a party arose from the conduct of the other party to the marriage that the result of that conduct is to be ignored because it can be said to fall under the label 'conduct of the parties' ".<sup>55</sup>

The change in emphasis that has occurred in most jurisdictions with respect to matrimonial causes is cogently summed up in a comment by Lenore Weitzman:

"(The) shift from a fault-based system of divorce to a no-fault system (has been) a shift from a morally based system of justice to a morally neutral system based on practical economic decisions".<sup>56</sup>

It should be noted, however, that many judges have exhibited reluctance to hear detailed evidence on even economic misconduct except where it has been of the grossest kind. Wade<sup>57</sup> expresses the view that its consideration involves a judgment as to social and cultural expectations. Is it a fault, for instance, for an executive's wife to refuse to entertain clients or to be seen regularly on the cocktail circuit?<sup>58</sup> Is it a fault for a shop-owner's wife to work only occasionally in the store and should a wife be considered at fault if she insists that, for the sake of family stability, a husband forego a transfer that means promotion and a salary increase?

Moreover, if conduct relevant to property allocation other than that which has led to the depletion of resources were taken into account, it would be possible for parties to introduce evidence of the effect of the activity of one spouse upon the other. All "fault" has consequences, either negative or positive. One spouse's adultery, nagging or cruelty may contribute positively to the other's wealth where it forces him or her to spend long and peaceful hours at work, or negatively where it causes depression, alcoholism and retrenchment. To categorise the complexities of a marriage relationship in order to weigh up the various degrees of economic consequences presents considerable evidentiary difficulties.<sup>59</sup>

The emphasis upon negative contributions by the other party leads inevitably to bitter accusation and counter-accusation in both written and oral evidence,<sup>60</sup> and this escalation of conflict is not only costly in both emotional and financial terms but it is clearly inimical to the notion of conciliation that is set down in s.43 of the Family Law Act. Accordingly, evidence of economic fault will be given little weight unless the causal connection between the behaviour and the economic loss is clear and direct.<sup>61</sup>

While it is often claimed that family law is immune to precedent, it is desirable that principles which can be seen to be

common to a particular class of cases find juridical expression. As Brennan J. pointed out in Norbis v. Norbis,<sup>62</sup> the anguish and emotion generated by litigation concerning property arrangements

"... are exacerbated by orders which are made without the sanction of known principles and which are seen to be framed according to the idiosyncratic notions of an individual judge. An unfettered discretion is a versatile means of doing justice in particular cases but unevenness in its exercise diminishes confidence in the legal process".<sup>63</sup>

It is submitted that the distillation of principles is particularly important where litigation is highly charged emotionally, as is the case when allegations have been made to the effect that one spouse's conduct has had the effect of diminishing the assets to be distributed between the parties to a marriage. On the other hand, principles must not be allowed to harden into legal rules or presumptions, for these would confine the Family Court's discretion more narrowly than Parliament intended.<sup>64</sup> In appropriate cases, the Full Court will suggest guidelines which may be applied to certain types of fact situation, but the discernment of trends in decisions at first instance is not as easy because trial Judges often use imprecise language or fail to explain why a particular decision has been reached.

In the sections of this chapter which follow, an attempt has been made to isolate the methods by which the Family Court is likely to deal with particular types of financial misconduct. Classification has proved to be difficult, however, and as a result, overlap from category to category will be noted in some instances.

In making orders for property division under s.79, the Family Court has considered to be relevant conduct which has resulted in a negligible contribution to the acquisition, conservation or improvement of assets; conduct which has diminished the value of property; and conduct which has impaired the financial prospects of a party to a marriage or altered the basis of his or her finances. It has also taken into account a failure to carry out the duty of maintenance or to meet the outgoings on property in



in the period after separation as well as the manipulation of assets to reduce the pool of property available for distribution.

## PART B

### CONDUCT RESULTING IN A NEGLIGIBLE CONTRIBUTION TO ASSETS

That misconduct such as "... sluttishness or extravagance on the part of a wife" or "... reckless gambling by a husband" should be taken into account "... where it has had a direct or indirect effect on the family fortunes" was recognised by Lord Simon of Glaisdale in Haldane v. Haldane.<sup>65</sup> As Watson and Wood SJJ. pointed out in Ferguson:<sup>66</sup>

"...(There) may ... be the rare or exceptional case where a party has ignored completely the basic concepts upon which the 'partnership' of marriage is founded. For example, there may have been no contribution whatsoever, not even as a homemaker and parent".

Care must be taken, however, not to regard an interest in property as a reward which may be forfeited for bad behaviour, or enlarged as a solace for reprehensible behaviour on the part of the other spouse.<sup>67</sup>

Conduct which has been adjudged responsible for negligible contribution to assets includes alcoholism, gambling, the squandering of assets through extravagant living and inadequate performance as a homemaker. Just as all contributory activity is considered to be relevant, correspondingly any deficiency of contribution must be similarly relevant for it is causally connected with the accumulation of the parties' assets.

#### (a) Alcoholism and gambling

In a New Zealand case, Madden v. Madden,<sup>68</sup> Jeffries J. indicated that not only is alcoholism known to be "notoriously expensive" but also that it "usually brings about a diminished performance on the part of the sufferer". This has been the

attitude of Australian courts which have been presented with evidence of alcoholism.

In a decision of the Supreme Court of British Columbia, Boyle L.J.S.C. considered a submission that the wife's alcoholism be viewed as a disease in mitigation of her failure to contribute to the marriage partnership. His Honour was of the view that, while alcoholism is generally accepted as constituting a disease or, at least, that a factor in its onset can be a physiological disposition, it ought to be distinguished from other diseases because of its strong voluntary element. In other words, it is possible for the victim of alcoholism to heal the illness "... through the admittedly difficult exercise of will".<sup>69</sup> A review of the decided cases in the Australian jurisdiction shows that, rather than regard alcoholism from the point of view that it is a disease or a disability, the Family Court has also looked at its financial effects. It appears that alcoholism on the part of the wife will be deemed to have affected her homemaking contributions under s.79(4)(c) while, where a husband is concerned, it will be considered to have had an effect on financial contributions under s.79(4)(a) and (b).

In Weber v. Weber,<sup>70</sup> Zelling J., "using a broad axe", assessed that the amount of time lost by an alcoholic wife who was at times unable to do the matrimonial duties which a wife "... ought to perform"<sup>71</sup> was something like ten percent or rather more than a year in the total thirteen years of the marriage. During such times as the wife was in hospital, the husband was unable to attend to his work, or at least not as well as he otherwise could have done. Moreover, the wife had spent house-keeping money on the purchase of alcohol. As a result, her share in the matrimonial home was reduced by one-tenth. Generally, rather than attempt a decision based on mathematical computation in a case where one spouse's contributions are alleged to have been inadequate, the Family Court conducts a balancing exercise, using value judgments<sup>72</sup> in order to assess the value of non-financial contributions to the accumulation of the assets of the parties. By looking at contributions to the acquisition of property, it is possible for the Court to avoid making enquiries into matrimonial culpability. Of course, for a decision to be of any value in

subsequent cases, the reasons for its particular form ought to be specified in a detailed manner.

In both Krotofil<sup>73</sup> and Mead,<sup>74</sup> it was found that the alcoholic husband had been a burden on the family business; accordingly, each was awarded a lesser share in the assets to be divided. The judge at first instance in Fane-Thompson<sup>75</sup> found that the husband had given very little financial support to the household for at least a decade: although he had worked hard at times, he had dissipated significant portions of his income on drink. As a result, a considerable financial burden had fallen on the wife, and had it not been for her financial energy there would have been no assets for distribution. The husband "... had negated his contribution by consuming its fruits".<sup>76</sup> Therefore, he had his share in the assets reduced to approximately one-sixth of their value. The Full Court upheld the decision, dismissing the claim of the husband that he had been penalised because of his alcoholism, on the grounds that "... (i)nsofar as the husband's conduct was relevant, it was relevant on purely financial matters".<sup>77</sup>

Mead<sup>78</sup> provides an excellent example of the operation of judicial discretion in the formulation of a financial order.<sup>79</sup> The husband was given some credit for the fact that, in the twenty years or so of marriage, some of his earnings must have gone towards the support of his family, even though a substantial amount of money had been used for his own pleasure. However, because Asche SJ. was aware that it was unlikely that the husband would make any payments on a loan to a co-operative society secured over the matrimonial home, he transferred all equity in the home to the wife. Although she would have the burden of repaying the loan if she wished to preserve the property, his Honour was of the view that even if she could not continue the payments, at least the wife should have the choice and benefit of selling the property and receiving the full equity in it.

If one party has "drunk a little", the effect of this may not have led to greatly impaired homemaking or parenting contribution nor to the dissipation or squandering of the family income. Cross JA. of the Supreme Court of New South Wales, Family Law Division in Powell v. Powell<sup>80</sup> expressed the view that

drinking on a small scale is "... merely part of the 'for better or worse' for which spouses take each other",<sup>81</sup> while Wood SJ. in L.,<sup>82</sup> another case in which the applicant led evidence as to the respondent's drinking habits, pointed out that "... if conduct is to be taken into account, then it must be of such a kind as to have had some bearing on the financial situation of the parties".

Economic loss sustained through gambling or reckless speculation on the part of one of the parties to a marriage is clearly a matter to be considered by the Court if it has had the effect of dissipating<sup>85</sup> the assets of both spouses.<sup>84</sup> It would be grossly unfair to expect the other spouse to bear the continual whittling away of capital (and perhaps even the sale of assets or borrowing on them to speculate recklessly) on the slight chance<sup>85</sup> that the family fortunes will be augmented by a substantial win.<sup>86</sup> It is not open for a party to the marriage to argue that his property has been lost through gambling and that a financial order cannot therefore be made against him.<sup>87</sup> In such a case the dissipated capital will be notionally included in the pool of assets then be considered as having been transferred to the profligate spouse as his eventual share,<sup>88</sup> and the party's future earnings will be taken into account in formulating an order (if any) for maintenance.

On the other hand, alterations in the distribution of property or the financial compensation of the other party would not be warranted on the strength of a more minor infraction such as mere bad judgment as opposed to reckless speculation.

While lottery winnings may represent a windfall element in certain instances,<sup>89</sup> where, as in Anastasio,<sup>90</sup> the ticket has been purchased during marriage for the furtherance of the joint matrimonial purpose of buying a home (the ticket was called "New Home"), the winnings will be considered to be a matrimonial asset. Therefore, the husband's expenditure of \$40 000 of a \$60 000 win on holidays and new clothes was inexcusable. The decision shows that an individual who wins money or prizes during the course of the marriage may seek to argue that such an asset should be considered his or her sole property. However, if the other spouse can show that the winning ticket was purchased with the money put at risk came from a fund to which both spouses had contributed,

either in money or money's worth, the asset will not be treated any differently from other matrimonial assets.

Implicit in what the Full Court decided in Holley<sup>91</sup> is the inescapable fact that the Court balances matters of conduct covertly if not overtly. The wife had complained that the husband had gambled on horses, but the Court held that she, too, had an interest in horses. Of course, to assess the amount of money which has been dissipated in gambling presents evidentiary difficulties, as the decision in Blann<sup>92</sup> indicates. There, it was held to be an abuse of process for the wife's solicitors to subpoena a sample of the bookmaker husband's clients in order to evaluate the husband's income.

(b) Squandering of assets through extravagant living:

Treweeke v. Treweeke,<sup>93</sup> which concerned a claim under s.85 of the Matrimonial Causes Act 1959 (Cth.), provides an example of the reckless<sup>94</sup> squandering of assets through extravagant living. The husband had lived a dissolute life, wining and dining at will, associating with women, gambling and frittering away his capital and borrowing heavily. Since there was a real danger of the respondent's capital being dissipated, Begg J. ordered that the matrimonial home, presently rented, be purchased in order to provide necessary security for the wife and children.<sup>95</sup> As Cairns LJ. pointed out in Martin v. Martin,<sup>96</sup> an English Court of Appeal decision,

"(A) spouse cannot be allowed to fritter away the assets by extravagant living ... and then to claim as great a share of what is left as he would have been entitled to if he had behaved reasonably".

It should be noted, however, that it is doubtful whether an injunction could be granted to control the conduct of a spendthrift spouse if the marriage were stable and there were no other proceedings between the parties unless the other spouse could identify the fund dissipated as being his or her own property.

It is not for the husband to say that he has earned the money and that therefore he should have control over how the wife should spend it, for "... (i)n the normal marriage relationship, the husband would be expected to leave to the wife the running of the household and the expenditure upon that household according to her judgment and discretion".<sup>97</sup>

Extravagant living after separation will be taken into account, however. The amount of \$10 000 that a husband received from the sale of a taxi licence and then spent on an overseas trip was taken into consideration when a property order was formulated since the wife had established that she had made a contribution to the acquisition of the licence during the marriage.<sup>98</sup>

Each of the above forms of "financial misconduct", namely alcoholism, gambling and the squandering of assets or income through extravagant living, possibly involves the use of funds held in a joint bank account.

The fact that money is deposited in a bank account in the joint names of spouses does not necessarily mean that they jointly own it.<sup>99</sup> The intention behind the contributions will determine the spouses' respective beneficial interests in the fund. If only one spouse deposits funds, whether or not the other spouse obtains a beneficial interest depends on the contributor's intention. In ascertaining this, the presumptions of advancement and resulting trust are relevant. In general, where both spouses contribute to a joint account, it is presumed that they hold beneficial interest proportionate to their contributions despite the fact that such accounts are widely treated as belonging to the spouses jointly. Should the legislature introduce a statutory presumption that funds in bank accounts and similar accounts in the joint names of spouses are owned by them jointly, then a spouse disadvantaged by his or her partner's dissolute habits would be protected to the extent of half the funds in the account, particularly since the presumption would apply in issues between the spouses and third parties. However, since the presumption could be rebutted by evidence of a contrary agreement between the spouses, its value as a protective device would be circumscribed to a certain extent.<sup>1</sup>

(c) Inadequate performance as a homemaker:

Paragraph (c) of s.79(4) requires the Court to consider the contribution made by a party to the marriage, whether the husband or the wife,<sup>2</sup> to the welfare of the family, including any contribution made in the capacity of homemaker and parent.<sup>3</sup> Nygh J. in Parker<sup>4</sup> indicated that paragraph (c) of s.79(4) "... refers to contributions which cannot be traced into the acquisition of wealth, but can best be seen as a claim for services rendered, such as keeping house, nursing, looking after children and the like".<sup>5</sup> The homemaker contribution contains both a material and a non-material component, the latter comprising the emotional support given to the other spouse and the children of the marriage.<sup>6</sup>

Not only is its assessment exceedingly difficult, therefore, but the quality of the homemaker contribution may also vary enormously.<sup>7</sup> It is for the Court to assess the value of the contribution in terms of what is just and equitable in all the circumstances of the case.<sup>8</sup> However, it is the intention of the Act that it should be recognised in a substantial and not merely a token way.<sup>9</sup>

To the extent that poor homemaking may lead to an impaired contribution, it is open to the Court to examine the conduct of the party who claims a contribution of this nature.<sup>10</sup> In fact, because of their intangible nature, it may be difficult to maintain a clear distinction between the contributions made as a homemaker and parent and the conduct of the spouse concerned.<sup>11</sup> Scutt and Graham<sup>12</sup> claim that if the husband thinks the wife has not done the housework to his satisfaction, his information is admissible for it is considered relevant to the build-up of assets. On the other hand, the fact that the husband has kept a mistress during the currency of the marriage is not considered to be relevant in a property hearing as to take it into account would amount to attributing matrimonial fault.<sup>13</sup> They express the view that his conduct ought also to be taken into account.<sup>14</sup> It is submitted that to do so is only just since such conduct has almost certainly had economic consequences.

In Sheedy,<sup>15</sup> the wife sought to argue that the husband had

maltreated her, rendering her task as homemaker and parent more difficult, and that such an allegation was relevant to an application under s.79(4)(c).<sup>16</sup> It was held that such conduct is only relevant where, by reason of it, the contribution of one party was materially lessened and the contribution of the other was materially increased. The mere argument that the husband's maltreatment made the wife's job as homemaker and parent more difficult did not provide a basis for admitting such evidence.<sup>17</sup> As Nygh J. pointed out, it is possible for one spouse to be personally obnoxious to the other and yet be an adequate homemaker and parent.<sup>18</sup>

It is therefore the significance of the contribution made as a homemaker and parent which is important, not the reason for the contribution. In Richards,<sup>19</sup> the Full Court rejected the argument that the trial judge had given undue weight to the wife's conduct during marriage, for the decision at first instance had been made against the background of the family history and the way in which particular assets were acquired. He had made a finding that "... in the general context her contribution to the general family life and to the assets of the family was minimal".<sup>20</sup> This approach is consonant with the view expressed by the then Attorney-General, Senator Lionel Murphy, in his Speech to the Senate on 13th December, 1973, in which he introduced the Family Law Bill 1973 for the first time. He said:<sup>21</sup>

"...(A) thrifty wife will presumably have done more to conserve the family resources than a spendthrift, and should therefore receive more than a spendthrift, when the family splits up - not as maintenance, but in the division of the matrimonial property."

In Soblusky,<sup>22</sup> the Full Court stressed that s.79(4)(c) should not be interpreted in a negative sense:

"(I)ts relevance lies only in cases where it is relied upon by the wife herself as a circumstance which the Court ought to take into account when determining whether or not to make any and if so what order for maintenance (or property)".



Consistent with this view is an obiter statement by Nygh J. in Pickard:<sup>23</sup>

"A childless wife who sits at home in a life of relative idleness may be said to have made little or no effort".<sup>24</sup>

Alternatively, in Kimber<sup>25</sup> it was held that the long hours worked by a husband were counter-balanced by the greater burdens resting on the wife as mother and homemaker. It is somewhat strange, then, to find the Court to hold in Aroney<sup>26</sup> and W.<sup>27</sup> that contributions are not detracted from by the employment of home help such as gardeners. Perhaps the contribution was made in the capacity of seeing that they performed their duties satisfactorily.<sup>28</sup>

Just as the courts have distinguished between alcoholism and the habit of "... drinking a little", so judges have distinguished between the spouse who has "... had some imperfections or limitations"<sup>29</sup> as a homemaker, for these are just part of "... the hurly burly of married life".<sup>30</sup> Generally, it is the wife's domestic contribution which is assessed but, since the Act strives to avoid any sexual bias, it is submitted that the husband's homemaker and parent contribution is also deserving of analysis.<sup>31</sup> Wilson J. in Mallet v. Mallet<sup>32</sup> stated that:

"The quality of the contribution made by a wife as homemaker or parent may vary enormously, from the inadequate to the adequate to the exceptionally good. She may be an admirable housewife in every way or she may fulfil little more than the minimum requirements. Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated with that of the other party."

However, as Wade<sup>33</sup> has pointed out, there is a considerable variety of community standards as to what constitutes an adequate homemaker contribution and, apart from the value judgments that Wilson J.'s comments introduce, they also have serious evidentiary consequences.<sup>34</sup> Similar objections are raised by Mason J.'s statement that, to sustain a conclusion that there should be equal division of assets

of the parties, "... the Court will need to be shown an equality of contribution - that the efforts of the wife in her role (as homemaker) were the equal of the husband in his",<sup>35</sup> for the valuation of unpaid contributions to the marriage partnership is rendered almost impossible by the absence of any scales of value for such work or even an acceptance by society that such work can be valued.<sup>36</sup>

It is submitted that the decision in Mallet v. Mallet<sup>37</sup> leaves it open for the husband to lead evidence as to the inadequacy of the wife's contribution under s.79(4)(c), notwithstanding what the Full Court said in Soblusky,<sup>38</sup> since the High Court disapproved earlier decisions<sup>39</sup> in which the Family Court had presumed that the contribution of the wife as homemaker should be equated with the contribution of the husband as income earner. As Chisholm and Jessep<sup>40</sup> have put it, there are problems inherent in taking into account serious misconduct, or contributions which may be considered to be inadequate: to do so means that less serious conduct has also to be taken into account, even if to a lesser extent, in order to provide a means of comparison. Evidence of this nature may reduce the proceedings to a battle centring on the parties' animosity towards each other, each trying to score an advantage against the other.<sup>41</sup> On the other hand, evidence of contribution will necessarily assume significance when the contribution relied on as the foundation for a claim to the acquisition of an interest in property has not been as significant as the applicant has maintained.<sup>42</sup> It will be for the Court to decide what evidence should properly be taken into account under paragraph (c) of s.79(4).

It is submitted that the approach in Bates,<sup>43</sup> whereby the Court made an objective assessment of what, in fact, the wife had done in the way of domestic contribution, is correct for the majority of cases. No attempt was made to discover why or under what circumstances the wife had not performed her household tasks nor was it considered relevant that homemaking was performed unwillingly or even with a bad grace. In other words, the fault concerned was peripheral to the main issue, namely whether a contribution had in fact been made as a homemaker and parent.

(d) Summary

Section 79(4), in specifying the matters to be taken into account in determining what order, if any, should be made under s.79, concerns itself in s.79(4)(a), (b) and (c) with those matters which relate to contributions made by either spouse, directly or indirectly, to the acquisition, conservation or improvement of the property, that is, those factors which have enabled the property to be acquired in the first place and maintained as a valuable asset. The subsections proceed on the premise that married persons acquire property with a view to looking after it and increasing their assets. Although they are silent on the question of what is to be taken into account where a party, contrary to normal standards of behaviour, does just the opposite with property acquired either by both spouses or by one spouse alone, it seems only just and equitable within s.79(2) that conduct resulting in a negligible contribution to assets should be taken into account when the Court is formulating an order under s.79.<sup>44</sup>

PART C

CONDUCT WHICH HAS HAD THE EFFECT OF DIMINISHING THE VALUE OF THE ASSETS OF THE PARTIES TO THE MARRIAGE

The Full Court in Antmann<sup>45</sup> in obiter dicta stated that the fact that a party has committed "waste" of the matrimonial assets may be a relevant fact or circumstance under paragraph (o) of s.75(2).<sup>46</sup> It held, however, that considerations of "negative contribution" has no place under paragraph (a) and (b) of s.79(4) (now paragraphs (a), (b) and (c) as a result of the 1983 amendments).

Mr Justice Baker in a later case, Kowaliw,<sup>47</sup> expressed a different view:

"It does seem to me ... that if a party has either by deliberate act or by economic recklessness reduced the value of assets available for distribution then the resultant burden to the other party are directly relevant to a consideration of the respective contributions of the parties contemplated by s.79(4)".<sup>48</sup>

His Honour went on to say that "... evidence of wantonness or recklessness"<sup>49</sup> having economic consequences is clearly a matter which the Court may take into account pursuant to the provisions of s.75(2)(o)".<sup>50</sup> That is, wastage of assets caused deliberately, negligently or recklessly by the actions of one spouse ought to be the responsibility of that spouse alone.

As defined in the Shorter Oxford English Dictionary, the transitive verb "waste" means inter alia to destroy, injure, damage (property); to cause to deteriorate in value; to consume, use up, wear away, exhaust by gradual loss; to spend, consume, employ uselessly, unprofitably or without adequate return; to squander; to fail to take advantage of (an opportunity). In all of these senses, to waste assets is to diminish their value in some way, either deliberately or through negligence of recklessness. With greater care, such diminution could have been avoided.

Orders under s.79 are based on a strong retrospective element<sup>51</sup> comprised of the parties' respective contributions, direct and non-direct, financial and non-financial, to the acquisition, conservation or improvement of any of the property of the parties to the marriage. Because of that retrospective element, a spouse's entitlement to apply for an order under s.79 is an important interest which has been building up throughout the marriage. That it is not for one spouse to diminish the inchoate or incipient share of the other is made clear by the provisions of the Family Law Act which enable the recapture of or protection of property which should properly be the subject of a s.79 order.

A spouse may be guilty of neglect towards the other spouse's property interests or he may act in reckless disregard of those interests. If he or she is neglectful, by extrapolation from the definition of "negligence" in Donoghue v. Stevenson,<sup>52</sup> he or she has failed to take care to avoid acts or omissions which he could reasonably foresee would be likely to diminish the property interests of the other spouse, who has been so closely and directly affected by the acts or omissions that he or she ought reasonably have been within contemplation. To expect such foresight on the part of most married people is not unreasonable since in the majority of marriages spouses consider their property to be

jointly owned.<sup>53</sup>

Recklessness is a form of mens rea which amounts to more than negligence, for the reckless spouse concerned is normally aware of the risk of particular consequences arising from his or her acts or omissions but he or she decides nonetheless to continue them and take the risk.

Since such negligence or recklessness may affect significantly financial matters between the parties, in appropriate circumstances evidence of it will be admissible and highly relevant to s.79 proceedings.

For the Family Court to consider financial detriment caused by the act of one spouse, the other party must have suffered more than the normal risks attendant on the ownership of property and the spouse committing the act of waste should have been aware of the potential loss to the other party to the marriage, yet nevertheless have persisted in the activity.

The value of the assets of the parties to a marriage may be diminished by a failure to obtain rent for a property during the separation period; the disposal of an asset during the separation period; and by deliberate acts of waste to property. The incurring of debts to third parties also has the result of diminishing the assets of the spouses.

(a) Failure to obtain rent for a property during the separation period

The husband's recklessness in Kowaliw<sup>54</sup> in vacating property and allowing a prospective purchaser to go into occupation rent-free for a period of some twelve months, in the meantime making no payments whatsoever in respect of mortgage instalments, rates and maintenance levies, was not allowed by the Family Court to go unrecognized. Baker J. held that the husband's conduct went beyond mere neglect; it was both "... commercially inept and economically reckless"<sup>55</sup> and he should bear sole liability for the financial loss that resulted.

It is not difficult to image other situations where one spouse, enraged because of the parties' separation, might behave in a manner which could be described as economically reckless. For example, he or she might fail to keep up insurance payments on the matrimonial home or the "family car" or on plant or machinery belonging to a business enterprise essential to the production of income necessary, say, for the continuing support of the children of the marriage. In such a case, that spouse would be responsible for bearing any loss accruing from his or her recklessness.

(b) Disposal of an asset during the separation period

The disposal of an asset in the period pending proceedings under Part VIII of the Act was considered in Kimber.<sup>56</sup> The husband, who sold a taxi licence considered to be part of the matrimonial assets and who spent \$10 000 of the proceeds on an overseas trip for himself and the two children of the marriage, was ordered to make a cash payment of \$26 000 to the wife, sole ownership of the matrimonial home then vesting in him. In Wilkes,<sup>57</sup> the Full Court held that, where a party disposes of an asset which is the subject of s.79 proceedings, this does not prevent the Court from taking the matter into account. In the circumstances, the proper approach of the Court is to treat the asset disposed of as an asset acquired by the parties during the marriage and to take this into account in formulating its final order.<sup>58</sup> Alternatively, the proceeds of the sale of the assets may be traced into subsequently purchased property.<sup>59</sup>

That the Family Court takes an unfavourable view of surreptitious sales of property in an attempt to prevent court orders being made against that property is made clear by the order of costs awarded jointly and severally against the husband and the third party intervener, namely the company controlled by the husband's parents, in Howard and Howard: Howard Developments Pty.Ltd.<sup>60</sup>

The Australian Law Reform Commission recently has considered the problem of such "pre-emptive strikes" as the removal of furniture from the matrimonial home by the departing spouse.<sup>61</sup> At present, a spouse can invoke the protection provided by s.85 and s.114(3) of the Family Law Act only after proceedings under the Act have

been commenced. An order or injunction affecting household goods can be made under s.114(1) "in circumstances arising out of the marital relationship". The Commission favours the introduction of a statutory presumption of co-ownership of household goods as this would bring the law into conformity with the general expectations of spouses as well as with the high proportion of joint ownership of matrimonial homes in Australia. Such a presumption to a certain degree would restrain a spouse from disposing of or otherwise dealing with household goods without the consent of the other spouse.<sup>62</sup>

(c) Deliberate acts of waste to property

Even though the spouse in possession of assets to which the other spouse may have a reasonable claim, either wholly or partially, may be said to be in the position of trustee to those assets, either during the marriage or in the separation period, bitterness between spouses may be so extreme that one party may commit a deliberate act of waste to property. Since such conduct reduces the value of that property, it has economic consequences that will be taken into consideration. The order made by the Court depends on the facts and circumstances of a particular case.

The husband in Page (No.2),<sup>63</sup> infuriated at an earlier court order<sup>64</sup> to vacate the matrimonial home, damaged it to the extent that repairs cost \$4,000 so the wife was allowed a credit of this amount. In Kimber,<sup>65</sup> the wife's property share was increased in order to compensate for the husband's deliberate neglect of the former home once he learned that his wife had a claim against it.<sup>66</sup>

Deliberate mismanagement of business activities in response to marital difficulties provides another example of waste to property in which the other spouse has an inchoate interest. As an Alberta court has pointed out, "(a) spouse claiming an interest in property is entitled to expect objectively prudent management of the business based on evidence of activity prior to separation".<sup>67</sup>

A party who has exclusive occupation of jointly-owned property has a prima facie obligation to maintain it in good repair; a deliberate failure to do so resulting in the waste of assets must

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be borne by that party.<sup>68</sup> Thus in Meyerthal v. Meyerthal,<sup>69</sup> the husband having allowed the house to fall into disrepair, Allen C.J. took into account the appreciation to the value of the house which would have occurred had the husband kept it in reasonable condition.

MacGregor<sup>70</sup> concerned a dispute over custody, but the parties' discord was "... transferred to the house itself, so that as the marriage deteriorated, so has the house deteriorated into an extraordinary state of disrepair quite alien to the station of life of the parties and to the total inconvenience of the parties and their children".<sup>71</sup> Since Wood S.J. found that the deplorable state of the house was attributable to the husband's obstinate refusal to effect repairs and improvements, and he was to have sole custody of the children, the husband was ordered to restore the house to proper habitable condition and make good the deficiencies enumerated by the Director of Counselling in his evidence within three months of the custody order being made.

Not only did the wife in Cordell<sup>72</sup> reduce the value of the matrimonial home while she had sole occupancy of it, but she disposed of certain fixtures and items of furniture and jeopardised the family business by taking more money than agreed from the till and disrupting the staff. Wood J. held that her behaviour was a fact or circumstance to be taken into account under s.75(2)(o) since it had economic consequences. Except for arrears in maintenance, she was not entitled to the payment of any money from a fund held by the Registrar of the Supreme Court representing the proceeds of the sale of the former matrimonial home. In any case, Wood J. was of the view that, since proceedings in the Supreme Court had not been transferred to the Family Court, he had no jurisdiction to order the Registrar to make any payments from the fund, even with respect to maintenance. He was also of the opinion that he could not order the Official Receiver to pay out from the parties' estates any moneys that he held pursuant to the Bankruptcy Act 1966 (Cth.) because, by virtue of s.78(3), such an order would not be binding upon him.

By a majority, the Full Court in Fraser<sup>73</sup> held that it was within the trial judge's discretion to order that the husband pay



from his share of the proceeds of the sale of the matrimonial home the whole amount by which the sale price was less than that price which would have been received but for the husband's machinations and obduracy over a period of four years. Just before an auction to be held as a result of an order made by Carmichael J. of the Family Division of the Supreme Court of New South Wales, the husband removed a number of fixtures from the property, including a garage.<sup>74</sup> Consequently, the auction was aborted and, in the falling market, considerably less was received from the sale of the property when it was eventually made.<sup>75</sup>

As a result of the decision in Madjeric,<sup>76</sup> it appears that the Family Court has jurisdiction in some instances to entertain a claim for damages in tort in respect of property which has been damaged. The wife claimed that certain chattels, ordered to be delivered up by a previous order of the Family Court, had been given to her in a damaged state. Elliott J. was of the view that he could have made further orders under s.79 within the parameters laid down by the Full Court in Molier and Van Wyk<sup>77</sup> to deal with the claim, but the wife, who had not had legal advice, had brought her claim under s.119, which provides that

"Either party to a marriage may bring proceedings in contract or in tort against the other party".<sup>78</sup>

While the Family Court, like all federal Courts, is constitutionally subservient in the federal hierarchy to the High Court, otherwise

"... it is consistent with the object and purpose for which the court was established that it should have all the powers necessary for it to do justice in exercising the judicial power of the Commonwealth in matters over which it has jurisdiction".<sup>79</sup>

By s.71 of the Constitution, it is provided that the judicial powers of the Commonwealth shall be vested in the High Court and in such other federal Courts as the Parliament creates. However, the jurisdiction within which the Family Court may exercise these powers has been limited by sections 31 and 33 of the Family Law Act 1975 (Cth.).<sup>80</sup>

Elliott J. held that the Family Court had both the power and the jurisdiction to hear the claim. As to jurisdiction, the proceedings were a matrimonial cause under definition (ca)(ii), being proceedings with respect to property of the parties, and under paragraph (f), being proceedings in relation to completed proceedings of a kind referred to in paragraph (ca) of the definition, namely s.79 proceedings. It has been noted already in Chapter Five, under the heading "Section 114(3)" that the recent decision of the High Court in Perlman v. Perlman<sup>81</sup> raises the question whether such a connection is in fact necessary.

Since marginal notes were not to be taken into account in statutory interpretation,<sup>82</sup> for they are not deemed to be part of an Act,<sup>83</sup> his Honour considered that s.119 should be construed as to its plain and literal meaning and not merely as clearing up any doubt that parties to a marriage have capacity to sue each other, as the marginal note to the section might suggest.<sup>84</sup> He found the power to make an appropriate order in s.34.<sup>85</sup>

This interpretation of s.119 leaves it open to a party to bring proceedings in tort<sup>86</sup> against the other spouse prior to the availability of principal proceedings provided that the elements of paragraph (ca)(i) of the definition of "matrimonial cause" in s.4(1) giving jurisdiction to the Family Court are satisfied.

A comparison of the result in Madjeric<sup>87</sup> with that in Page<sup>88</sup> demonstrates the advantages that accrue from the approach taken in the former case. In Page, Tonge J. considered an application made by the wife for an order that any conversion of certain shares made by her husband be set aside under s.85. Since no proceedings were on foot under Part VIII of the Act (the case was decided before the 1983 amendments), the application was dismissed. However, his Honour<sup>89</sup> conceded that if the matter could be brought within the ambit of circumstances arising out of the marital relationship, then he would have jurisdiction to entertain an application for an injunction to restrain dealings in the shares.<sup>90</sup>

Because of the operation of s.109 of the Constitution, s.119 of the Family Law Act displaces State laws, which prior to the

introduction of the Act purported to define inter-spousal liability in tort, that are inconsistent with the tenor of the Commonwealth provision. Hardingham and Neave<sup>91</sup> suggest that in any inter-spousal tort dispute, the exclusive repository of jurisdiction is now s.119 of the Family Law Act. They also express the view that s.119 does not require that such dispute be litigated in courts as defined in the Act. It is submitted that this is too liberal an interpretation of the provision.

It should be noted that the availability of proceedings in tort in the Family Court offers advantages over the summary procedure which was provided by the Married Women's Property legislation, because although a court exercising jurisdiction under this legislation had a discretion regarding the making of an order for possession of property, except in New South Wales,<sup>92</sup> it had no discretion regarding the determination of title.

In summary, it may be stated that, provided that a party's act of waste has been deliberate, reckless or negligent and it has resulted in a not insignificant diminution of the value of property or its disposal, the Family Court can provide a remedy to the aggrieved party in cases which fall within its jurisdiction.

#### (d) Debts to third parties

The incurring of debts to third parties<sup>93</sup> also has the effect of diminishing the assets to be distributed between the parties to a marriage. In fact, the spouse who has legal title to most or all of the parties' assets can entirely destroy those assets by incurring personal or secured debts beyond the value of those assets.<sup>94</sup> In later sections of this chapter, legislative reform which would protect one spouse against the irresponsibility of the other will be discussed.

Certain debts ought to be shared between the spouses. Such debts include those incurred with the express or implied consent of both parties to the marriage, those whose proceeds have been used to benefit family members apart from the borrowing spouse or those incurred "... in the course of the pursuit of matrimonial objectives".<sup>95</sup> On the other hand, where a debt has been incurred

by one spouse without the consent of the other or at the expense of family involvement,<sup>96</sup> that spouse ought to bear liability for its repayment. In actuality, a spouse who has had little or nothing to do with incurring a debt such as a loan from a financial institution, a credit card transaction or a store account may find that its payment may seriously delay that person's access to property from the marriage or leave that person in a much more unfavourable position than he or she could have envisaged.<sup>97</sup>

Where one partner has incurred the debt (and, according to the survey of divorced persons conducted by the Australian Institute of Family Studies, this is usually the husband<sup>98</sup>), and he or she reneges on payment, the other partner, who has probably known little or nothing about the debt and who is usually in a very weak position to pay it, is forced to take responsibility.<sup>99</sup> Further, non-asset related debts can be incurred by one partner in the period between separation and distribution yet still be taken into account by the Family Court when it is considering a s.79 application for property distribution.<sup>1</sup>

The Family Court will disregard debts that are speculative, vague or unlikely to be collected. In appropriate cases, under the Family Court's accrued jurisdiction to determine non-Federal proceedings which arise from "a common substratum of facts" which are relevant to pending Federal proceedings,<sup>2</sup> it may quantify a debt. Otherwise, the creditor must apply to a State Supreme Court for its quantification.<sup>3</sup> In exercising its discretion to apportion debts between the parties, in s.79 proceedings, the Family Court can order the spouse responsible for incurring the debt to bear sole responsibility for its repayment. However, since property cannot be settled directly on third parties in s.79 proceedings,<sup>4</sup> it may be necessary for the Court to order the transfer of funds to third party creditors. If the responsible spouse is insolvent, creditors must seek their remedy at common law as secured or unsecured creditors.

It is questionable whether an application by the non-debtor spouse for a s.114(3) injunction to temporarily restrain a creditor from collecting a debt under the general law will meet with satisfaction. If there has been a bona fide commercial transaction,<sup>5</sup> the Family Court will not interfere, particularly since the High

Court's decision in Re Ross Jones and Marinovich; ex parte Green.<sup>6</sup>  
 In other cases, Family Court Judges have shown themselves to be very reluctant to restrain creditors even temporarily from pursuing their common law remedies against debtor spouses, whether or not the creditor intervenes under s.92 or appears in Family Court proceedings.<sup>7</sup>

On the other hand, if a creditor is given leave to intervene under s.92 in s.79 proceedings or is allowed to argue the merits of his claim without such leave, then the decision of the Family Court concerning the alleged debt may become binding by a principle of estoppel since other courts may refuse to interfere with the Family Court's finding regarding the rights of the third party.<sup>8</sup>

#### PART D

#### CONDUCT WHICH HAS IMPAIRED THE FINANCIAL PROSPECTS OF A PARTY TO THE MARRIAGE OR ALTERED THE BASIS OF HIS OR HER FINANCES

##### (a) Impairment of financial prospects of a party to the marriage

In formulating a s.79 order or an order for maintenance under s.74, the Family Court, in accordance with the provisions of s.79(4)(e) and s.75(1), must consider the matters set down in s.75(2) of the Family Law Act. The provisions of s.75(2)(b) and s.75(2)(d) respectively provide for the situation where one spouse, through direct physical injury or some other means, has injured the other to the extent that the injured spouse has not the mental or the physical capacity for appropriate gainful employment and he or she will in future need to meet financial obligations such as medical expenses and payment for special care. If a particular case does not fall into any of the categories set down from s.75(2)(a) to s.75(2)(n), then the Court has the discretion under s.75(2)(o) to consider any fact or circumstance which the justice of the case requires to be taken into account.

The fact that s.75(2)(o) is properly to be regarded as being concerned only with the financial implications of conduct was recognised in Barkley v. Barkley<sup>9</sup> by Carmichael J. of the Supreme Court of New South Wales.

In that case, an assault by the husband<sup>11</sup> had deafened the wife to the extent that her future employment prospects were impaired. Notwithstanding her injuries, she had retained her job as a clerk, however. The Court considered whether the Family Law Act allowed it to entertain what was in effect an application that the wife be compensated for future economic loss or other damage resulting from the assault.<sup>12</sup> Carmichael J., basing himself on s.75(2)(b), which inter alia relates to the physical capacity of a party to obtain appropriate gainful employment, held that the wife should receive as damages for her injured ear the benefit of \$16 000, an amount slightly in excess of the value of the husband's interest in the matrimonial home. In formulating the order, Carmichael J. took into account the fact that the wife had already prosecuted the husband privately and had obtained an order for \$4 000 compensation from a District Court. His Honour stated:<sup>13</sup>

"I cannot see that because a result very relevant to the means of a party arose from the conduct of the other party to the marriage that the result of that conduct is to be ignored because it can be said to fall under the label 'conduct of the parties'."<sup>14</sup>

Bell J. in Hack<sup>15</sup> made it clear that the manner in which a wife had become quadriplegic<sup>16</sup> was not relevant to her applications for maintenance and a property settlement. He refused both a submission by counsel for the wife that he should quantify her property settlement according to the heads of damage used in the civil jurisdiction and a submission that the wife's forbearance from taking civil proceedings against her husband should be taken into account in the quantification of orders of the Court. Counsel had relied on the fact that Carmichael J. in Barkley v. Barkley<sup>17</sup> had restrained the applicant by way of injunction from proceeding in another court for damages for assault, but Bell J. pointed out that, in that case, the respondent had already been found guilty of the assault in a criminal trial. His Honour was of the view that in the case before him the applicant's cause of action was "... still alive".<sup>18</sup> However, her quadriplegia was relevant in that she was permanently incapacitated for any form of gainful employment and would require continuing and expensive medical care. While he was of the view that it would be preferable to sever once

and for all the financial relationship between the parties, Bell J. offered the husband an alternative should he find himself unable to pay an amount of \$68 000 by way of property settlement and lump sum maintenance. The husband was given the option of paying the wife a sum of \$50 000 by way of property settlement and continuing maintenance of \$50 per week.<sup>19</sup> Since an award for damages made under the general law takes no cognizance of the capacity of the defendant to meet it, the injured party is more likely to obtain satisfaction of an order made by the Family Court for it is tailored to suit the respondent's financial resources and his or her capacity to pay. The Family Court may order the transfer of property to the applicant, the payment of a lump sum or the payment of periodic maintenance.

Orders of the type made in this decision should not be seen in the context of punishment for the spouse alleged to have caused the injury but as orders made within the discretion of the Court to provide for the future needs of an applicant according to the provisions of s.75(2), which are incorporated in s.79 by s.79(4)(e). It is for the civil or criminal courts to make an order as to damages for the past injury should such order be warranted for they are better suited to making decisions concerning complex issues of fact and relative degrees of fault.

It is submitted that the approach of the Family Court is preferable to that taken in the English jurisdiction, although the result for the applicant may ultimately be the same. The Court of Appeal's decision in Jones v. Jones<sup>20</sup> illustrates this point. The husband had attacked his wife with a razor, severing the tendons in her right hand. In formulating an order in relation to property and maintenance, the court expressly took into account the husband's conduct, although it indicated that the wife was unlikely to obtain further work as a nurse because of her injury and that she needed a home for the five children of the marriage. Had it looked at the financial consequences of the husband's conduct, there would not have been any need for the Court of Appeal to have concerned itself with conduct as such.

It is worthwhile to note at this juncture that the apportionment of compensation awarded as a result of civil action may give

rise to difficulties where spouses have become estranged. For instance, one spouse's contributory negligence may have caused him to be seriously injured in a motor vehicle accident and the compensation awarded him by the court may be reduced proportionate to his negligence. Since such compensation could be viewed as a "financial resource" of the parties and since its quantum has been reduced because of fault on the part of the injured spouse, arguably the other spouse's financial detriment ought to be recognised in a subsequent order under s.79. The question of the husband's contributory negligence and its relevance to a s.79 order was raised in O'Brien<sup>21</sup> but the case was decided on another point and the issue was not resolved.

In Tye (No.2),<sup>22</sup> the husband's pre-meditated desertion was held to have caused the wife's nervous breakdown and hence her temporary incapacity for undertaking paid work. The wife had worked to support her husband for almost five years while he obtained tertiary qualifications and he had then deserted her, claiming that after he had settled in Singapore he would send for her. Since the husband had no real assets but only future earning capacity, the wife was awarded a lump sum of \$1 700 as well as periodic maintenance for the period of two months in which she would be unfit for gainful employment.<sup>23</sup> The decision illustrates that the mere fact that one party has caused the breakdown of the marriage will be irrelevant to an application for a financial order unless the conduct has had economic consequences<sup>24</sup> for it is not for the Family Court to punish a party in financial terms for bringing about the breakdown. Its function is to give financial compensation where this is due, not to mete out retribution.

An Orthodox Jewish wife, whose husband refused vindictively to grant her a religious divorce, or "Get", had an award for maintenance made in her favour as compensation for the fact that his refusal rendered her unmarriageable according to the customs of the religious community of which she was a member. The lack of a "Get" meant that opportunities to remarry and gain economic support were jeopardised.<sup>25</sup> Since the husband was likely to try to avoid compliance with the Court's order that he pay periodic maintenance, the trial judge ordered the payment of interest on the



amounts of maintenance ordered pending their payment. This approach was approved by the Full Court when the case was taken to appeal.<sup>26</sup>

In the above decisions, maintenance of the injured party was ordered by the Family Court. It is submitted that it is in the public interest for the Court, so far as it is possible, to place the financial burden of the injury, no matter what its form, on the shoulders of the spouse responsible for it.

(b) Conduct which has altered the basis of the other party's finances

The Family Court has provided a remedy where the basis of one party's finances have been altered by the conduct of the other where, for instance, the respondent has been responsible for resiling from an agreement to sell property; encumbering property without the other spouse's permission; spending money on co-owned premises without the other spouse's permission; leading the other spouse into unnecessary expenditure on legal and/or other expert advice; attempting to minimise the other spouse's domestic contribution; incurring unnecessary business liabilities; selling property at an undervalue, and being in debt to the other spouse or stealing from him or her.

(i) Resiling from an agreement to sell property

The fact that the wife resiled from her agreement to allow her husband, after their separation, to sell a certain parcel of land (Whiteacre) in order to finance the purchase of another property (Blackacre), provided that he did not alienate Blueacre, was considered by Asche SJ. in A and A (Breach of Contract).<sup>27</sup> The wife placed caveats on both Whiteacre and Blueacre, forcing the husband into taking out a loan for \$100 000, the sum which he had expected from the sale of Whiteacre. The husband estimated that the interest lost in this way was approximately \$22 000 at the date of the hearing. His Honour held that there had been a clear breach of the agreement and that the resultant

financial detriment to the husband should be taken into account as a relevant fact or circumstance under s.75(2)(o) of the Act in quantifying an order under s.79. He was careful to point out that it is not always the case that principles of the law of contract must be imported into a family law matter, since the terms of s.79 and s.75 rest on a much broader basis.<sup>28</sup> The case before him, however, was a clear instance of direct damage being occasioned by the husband and this had rendered him less able to pay what would otherwise be a proper financial settlement.<sup>29</sup> The wife's property share was consequently reduced by \$20 000 to offset the loss sustained by the husband, since Asche SJ. was of the view that it was not necessary to assess damages with the same exactitude as at common law.<sup>30</sup>

(ii) Encumbering property without the permission of the other spouse

For one party to encumber property without the knowledge and permission of the other is to alter the basis of that other party's finances.<sup>31</sup> In fact, if the debtor spouse has legal title to most or all of the marital assets because they are registered in his name, he is able to encumber such property to the extent that the other party's inchoate share under s.79 is diminished or even destroyed. The Family Court has responded to such circumstances in a variety of ways.

The husband in Kimber<sup>32</sup> raised money for the purchase of another property by using as part security the mortgage on the matrimonial home. The mortgage to the bank had been paid off but not discharged so, as far as the bank was concerned, there was no impediment to providing the funds that the husband requested. The trial judge took this transaction into account under s.75(2)(o) and included the purchased property in the pool of assets to be divided notwithstanding that it had been purchased in the husband's sole name and it had been sold before the hearing.

Nygh J. in Heath and Heath; Westpac Banking Corporation<sup>33</sup> assessed competing claims to a sum of \$26 000 raised by the husband as a second mortgage without the wife's knowledge. Since the bank had notice of the wife's claim to an interest in the property concerned, because the husband had given her impending property claim as the reason for his request for the loan and a search of the title would have revealed the wife's caveat, the bank's interest in the \$26 000 was postponed to the wife's property claim.<sup>34</sup>

Principally, s.79 orders are designed to allocate property interests in such a manner as to recognise past contributions. Logically, then, liabilities should also be allocated according to the past contributions to those liabilities. Therefore, the Family Court may apportion responsibility for repayment of a debt according to the benefit each party received from the proceeds of the original loan. If a loan has been used wholly for the personal benefit of one spouse, then that spouse should be responsible for its repayment.<sup>35</sup> On the other hand, if the other spouse has also received benefit from the debt, even though it has been incurred without his knowledge or permission, then he or she ought to bear part responsibility for its discharge, for the Court's concern is with financial detriment, not with punishment for certain kinds of conduct. In this instance, the debt could be notionally divided between the spouses in the same proportions as the divided assets or one spouse could be given a higher proportion of the assets.

It is not unusual for a wife to allow her interest as joint tenant in the matrimonial home to be mortgaged to secure her husband's debts. If her spouse becomes bankrupt, normally she is entitled to only a half share of the equity of the matrimonial home, for the remaining half of the equity will vest in the Trustee in Bankruptcy under s.58 of the Bankruptcy Act 1966 (Cth.) and

be quite invulnerable to s.79 proceedings. However, in some circumstances, the equitable doctrine of exoneration may permit the wife to recoup some of the lost value of her matrimonial asset in proceedings before the Bankruptcy Court.

In Farrugia v. Official Receiver in Bankruptcy;<sup>36</sup>  
Deane J. stated that

"(w)here the property of a married woman is mortgaged or charged in order to raise money for the benefit of her husband, it is presumed, in the absence of evidence showing an intention to the contrary, that, as between her husband and herself, she meant to charge the property merely as a surety. In such a case, she is, as between her husband and herself, in the position of surety and entitled both to be indemnified by her husband and to throw the debt primarily on his estate to the exoneration of her own".

However, before the wife is entitled to payment by the Official Receiver of an amount equivalent to the value of her property to the extent that it was diminished by the husband's debt, she must show that the debt was raised solely for her husband's benefit and convince the court that s.111 of the Bankruptcy Act, by which "(a)ny money or other property of the spouse of a bankrupt lent or made available by the spouse to the bankrupt shall be treated as assets of the bankrupt's estate...", is inapplicable in the instant case.

The Australian Law Reform Commission has examined a range of possible measures to protect the interest of a non-titled ("non-entitled" in the terminology used by the Commission) spouse in the matrimonial home. Alternatives include statutory co-ownership as suggested by the English Law Reform Commission;<sup>37</sup> a statutory presumption of co-ownership such as that embodied in s.161 of the Marriage Act 1958 (Vic.), which will not

be applied where there is sufficient evidence of intention to the contrary or where the judge deems it unjust in the circumstances;<sup>38</sup> a statutory right of occupation and restrictions on dealings;<sup>39</sup> and a system whereby a claimant spouse may give notice that he or she has an interest in the property.<sup>40</sup>

All of the alternatives analysed by the Commission have drawbacks but it is submitted that legislation modelled on the provisions of ss.6 and 7 of the Matrimonial Homes (Family Protection)(Scotland) Act 1982 (Scot.), which are designed to restrain the entitled spouse from disposing of or encumbering the matrimonial home,<sup>41</sup> would serve to protect the interest of the non-entitled spouse without these being a need to obtain an injunction or a s.85 order. Under the Scottish provisions, a third party who takes the property bona fide for value without notice that it is a matrimonial home obtains a good title. This can be established if the owner spouse produces an affidavit declaring that there is no non-entitled spouse; that the property is not a matrimonial home; that the non-entitled spouse consents to the transaction or that it has been authorised by a court. An entitled spouse who improperly disposes of an interest in the home or who swears a false affidavit may be compelled to substitute other real property for the matrimonial home, or to make monetary compensation to the other spouse.

Such legislation, if introduced to Australia, would be better enacted uniformly by the States rather than imposed by enactment of the Commonwealth. To require a sworn affidavit of the type described above before the transfer of an interest in a house could be registered would not be difficult to administer. Since the bona fide purchaser would obtain a good title to property purchased in reliance on the affidavit, third party interests would be protected as well.

(iii) Spending money on co-owned premises without the other spouse's permission

The expenditure of money on co-owned premises without the permission of the other was considered in Helliard.<sup>42</sup>

The Full Court held that the husband had no right of action against the wife for the moneys used to remodel the premises concerned since she had not agreed to the expenditure. One tenant-in-common who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution.<sup>43</sup>

Logically, however, if the property in question is sold at a profit after renovation, the cost of renovation assumes a different perspective and ought to be allocated between the co-owners.

(iv) Leading the other spouse into unnecessary expenditure on legal and/or other expert advice

Unreasonable behaviour by one party may lead to unnecessary expense on the part of the other. Notwithstanding the fact that s.117(1) provides that each party to a proceedings under the Act shall bear his or her own costs, the Court has the discretion to order costs against one party under the provisions of s.117(2), which was inserted by the 1983 amendments and is subject to s.117(2A), and s.118.

Section 117(2A)(c) empowers the Court to take into account the conduct of the parties to the proceedings "... in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters".<sup>44</sup> This paragraph allows the Court to take into consideration circumstances such as those which arose in Greedy,<sup>45</sup> where the husband had presented his case and given his evidence in such a manner as to add to the length and difficulty and therefore the expense of the case, and Kelly (No.2),<sup>46</sup> where the husband did not disclose<sup>47</sup> anything voluntarily.<sup>48</sup>

It appears from the High Court decision in Penfold v. Penfold<sup>49</sup> that the Family Court's discretion in awarding costs is quite wide.<sup>50</sup> However, it would be unreasonable to award costs against a party merely because that party has not kept proper business records at a time before the parties' separation. An award of costs ought to bear some relation to the conduct of the proceedings by the parties or to their relative circumstances at the time of the application and the hearing of the matter.

Where proceedings have been necessitated by the failure of a party to a proceedings to comply with previous orders of the Court, the Court is empowered by s.117(2A)(d) to award costs against that party.<sup>51</sup>

Where the Court makes a costs order under sec.117(2), it is obliged to fix the amount of the costs (O.39 r.19). A Judge can do this by considering the evidence of costs as submitted by the successful party, and/or making an estimate of costs based upon figures contained in O.38 of the Rules of Court. If unwilling to make such an estimate, then the appropriate course is for the Judge to request from the Registrar a report concerning the amount of costs which have been properly incurred.<sup>52</sup>

Section 118(1)(b) enables the Court to make an order as to costs where it is satisfied that proceedings are frivolous or vexatious.

Costs may also be awarded against a party for refusing to make a counter-offer or for rigidly refusing the other party's claims, as in Greedy.<sup>53</sup> However, as Nygh J. pointed out in Jensen,<sup>54</sup>

"... it is not obligatory on the husband to make an offer which anticipates the Court's ultimate decision. There must be a certain amount of latitude in the conduct of negotiations, otherwise one would simply return to the earlier rule that if

the husband fails in his claim or counter-claim, he pays the costs of the successful wife".

Where one party has put the other party to the marriage to unreasonable expense by forcing him or her into expenditure on expert advice, the Court may order the party at fault to pay the cost of that advice even though it was obtained without his or her permission.<sup>55</sup> However, before such an order will be made, it must be shown that the other party's costs in making financial investigations were substantially increased.<sup>56</sup>

If a party has been evasive as to his or her own financial position and assets and he or she is unable to give any satisfactory explanation as to how moneys have been disposed of, a trial judge is entitled to make assumptions adverse to that party as to the continued existence of such funds.<sup>57</sup> Where there is lack of specific evidence that a party has concealed assets, but the Court has a suspicion that disclosure has not been full and frank, "... (a)t most, if it is convinced that the respondent has kept something back, it can take that factor or circumstance into account under s.75(2)(o) and make a more liberal division of the known assets in favour of the applicant".<sup>58</sup> The lack of sympathy given a party who is evasive is illustrated by the statement of Hutley JA. in St. John v. St. John:<sup>59</sup>

"Faced with a party whose affairs were tangled and who did not give the assistance within his power to disentangle them the trial judge in my opinion was well entitled to simply take the view that it lies upon that party to comply with the order".<sup>60</sup>

The failure to disclose a material fact in an ex parte application for an injunction has led to the discharge of the injunction even though, had the disclosure been made, the injunction would still have been granted.<sup>61</sup>



However, the discharge of the injunction on that basis would not prevent the granting of a fresh injunction on the merits then established.<sup>62</sup> Such an instance as this would cause the other party increased legal costs which could be significant enough to warrant the Court's exercise of its discretion to make an order for costs under s.117(2).

(v) Attempting to minimise the other spouse's "contribution" to assets

The principles of estoppel and illegality may complicate the presentation of evidence of past contribution under s.79. Frequently, a husband has attempted to minimise income tax<sup>63</sup> or evade creditors by representing that his wife has been paid regular wages for her extensive contribution to a business or partnership, whereas in actuality she has been paid little or nothing. However, after marriage breakdown, he may deny his former assertions in an attempt to minimise his wife's "contributions" to assets when she makes an application under s.79 for a property settlement. At common law, the husband would be unlikely to be able to retrieve the property by giving evidence of his express improper intention because the common law courts have been reluctant to impose trusts or contractual conditions which would assist the improper purpose.<sup>64</sup> However, it appears that, under s.79, the Family Court may look behind the overtly declared intentions and contributions and accept the husband's evidence of what actually happened. Therefore, it would be to the advantage of the wife, but disadvantageous to the husband, to take proceedings at common law prior to the institution of property proceedings in the Family Court where property held in partnership by the spouses, the winding up of a family company or the severance of a joint tenancy in the names of the husband and the wife are concerned.

The decision in Elias<sup>65</sup> illustrates this point. A husband and wife were partners in a smash repair business

so that for taxation purposes the income of the business could allegedly be divided equally. In fact, the wife contributed little to the business and was paid nothing.<sup>66</sup> After their divorce, the wife sought property orders in her favour under s.79. When initially considering the common law rights of the parties, Goldstein J. commented:<sup>67</sup>

"I thus have to consider when approaching the matter of alteration of property interests whether the husband can be heard to say to the Commissioner for Taxation that the smash repair business is half his and half his wife's and to say to her and this Court that it is all his."

At common law, the judge decided that the wife was entitled to half of the partnership property, but then, under s.79, he reduced the share to about one quarter, based upon her "real" contribution.<sup>68</sup>

As pointed out in Elias,<sup>69</sup> it is not open to a husband to maintain on one hand that he has transferred part or all of his property to his wife as a gift and later to deny that any such transaction took place. When the gift was originally made, the legal and equitable title would have passed to his wife, and he would not then be able to claim that he had retained an equitable interest in the property.<sup>70</sup>

(vi) Incurring unnecessary business liabilities

It appears that unnecessary business liabilities are a factor to be taken into account in formulating a financial order. Murray J. in Kutcher<sup>71</sup> held that the husband had incurred certain liabilities in his business ventures "unnecessarily" and that, accordingly, the liabilities could not be taken into account in his favour in determining what was just and equitable in the way of a property settlement or an order for maintenance. The Family Court will also disregard the financial

liabilities incurred by a party if they have been undertaken in deliberate or reckless disregard of the interest the other spouse may be entitled to claim under s.79.<sup>72</sup>

It is submitted that this is the only just approach.

One spouse should not invest in business ventures on a scale which is far beyond his or her own resources and which he or she can only finance by putting into jeopardy money or property which the other spouse may be entitled to share under a s.79 order. In Royer v. Royer,<sup>73</sup> a decision of the British Columbia Supreme Court, the wife was compensated for her husband's dissipation of assets through "wheeling and dealing" for he had been "... careless, indifferent and callous in failing to recognize and provide for the rightful share of the wife".

On the other hand, a distinction ought to be maintained in the case of losses sustained because of errors of commercial judgment rather than reckless speculation. Also, in a case where both spouses have engaged in speculative activities and both have at times shared in the profits of such activities, then both spouses should share the losses made.

(vii) Selling property at an undervalue

To sell property at an undervalue<sup>74</sup> when such property could be the subject of a s.79 order is a clear instance of conduct causing financial detriment to the other spouse. The Australian Institute of Family Studies' survey of divorced couples to analyse property and income distribution on divorce in Australia found it to be not uncommon for a business to be wound down in order to minimise its apparent size in the period between separation and distribution.<sup>75</sup> In such circumstances, if it is not possible to set aside the disposition under s.85, it will be open to the Court to reduce the property share of the spouse responsible for the sale or increase the size of any financial order made to the disadvantaged spouse. On the other hand, where the

sale of property at an undervalue has been consequent upon an order of the Family Court, the Court is unable to provide a remedy despite the fact that there may have been a considerable financial detriment to a party to the marriage. Nygh J. considered this situation in Gubbay.<sup>76</sup> The Family Court had made an order that the wife should pay the husband on or before a certain date some \$220 000 plus interest. In default of payment, the wife was to sell her interest in a New South Wales property and certain overseas properties, the net proceeds of such sale to be divided equally between the parties. The wife failed to pay the sum of money, but she negotiated the sale of the New South Wales property, she being the sole registered proprietor. The husband claimed \$25 000 by way of damages, claiming that the property had been sold at an undervalue. It was held, however, that the husband's claim amounted to a claim for damages for breach of trust, the remedy for which arose under State law. As Nygh J. pointed out, with regard to the enforcement of property orders, the Family Court only has the powers expressly conferred upon it by the Act.<sup>77</sup> His Honour held that he was unable to hear the matter under the associated jurisdiction of the Family Court (s.33), for this arose only in relation to matters which arise under Federal laws, other than the Family Law Act 1975,<sup>78</sup> nor would the Family Court's accrued jurisdiction provide the husband with a remedy.

It is submitted that legislation designed to restrain one spouse from disposing of his or her interest in the matrimonial home, discussed above in the context of mortgages raised without the other spouse's consent, would prevent a spouse from selling the matrimonial home at an undervalue. Other property would remain vulnerable to such dealings, however.

(viii) Being in debt to the other spouse

Where one spouse is in debt to the other, opinions vary

as to the manner in which such a debt is to be recovered. The Full Court ruled in Slattery<sup>79</sup> that s.79 does not empower the Court to order the repayment of loans between the parties, but it appears that s.78 may provide a means by which certain debts can be recovered. In Sharp v. Sharp,<sup>80</sup> Toose J. denied that the Court had jurisdiction to order the repayment of a debt under Part VIII of the Act. However, he was of the view that the Court may declare the existence of a chose in action<sup>81</sup> and then take it into account in making orders relating to maintenance and property. Accordingly, he ordered the respondent to pay the applicant a lump sum by way of maintenance, taking into account in the calculation of such sum his indebtedness to her. His Honour then directed that the applicant not proceed independently for enforcement of the debt.<sup>82</sup> Barblett J. in Matusewich<sup>83</sup> declared the existence of an equitable chose in action under s.78(1) and then, in exercise of his jurisdiction to make a consequential order under s.78(2), gave a money judgment to the applicant, since he considered that such a judgment comprised a "consequential order" made with a view to giving effect to a declaration of entitlement to the chose in action. The husband had sold the matrimonial home after the wife had left him and had used the entire proceeds to purchase a licensed fishing boat despite the fact that the payment of \$1 000 by the wife to the initial deposit on the house had created a resulting trust in her favour. Not only did Barblett J. hold that she was entitled to this sum but, on the authority of Wallersteiner v. Moir,<sup>84</sup> she was also to receive interest on it. The wife had a good equitable title to a chose in action constituted by her right to recover the monies held by her husband on trust together with interest thereon.

A similar approach was adopted by Joske J. in Schrieber and Dixon,<sup>85</sup> which concerned rights in contract, but his Honour found the source of the Court's jurisdiction to enter a money judgment in s.80. However, as

Hardingham and Neave<sup>86</sup> point out, s.80, unlike s.78(2), does not confer any fresh jurisdiction on the Court; it merely affords the Court the greatest flexibility in the formulation of orders otherwise within jurisdiction. Barblett J's approach is to be preferred, therefore.

There are obvious advantages to the applicant for an order concerning a debt owed him or her by the other spouse if it can be obtained from the Family Court. Under the equivalent to s.17 of the Married Women's Property Act 1882 (Eng.), jurisdiction is conferred only to resolve disputes concerning identifiable property. The court has no power to give what is the equivalent of a judgment for a sum of money except insofar as it may declare entitlement to an identifiable fund.<sup>87</sup> Therefore, a debt owed by one spouse to another cannot legitimately form the subject of an application under the section,<sup>88</sup> although the benefit of a debt owed a third party, being an identifiable chose in action, is property within the section.<sup>89</sup>

(ix) Stealing property from the other spouse

In Burridge,<sup>90</sup> Nygh J., in an obiter statement said in reference to a provision which is now paralleled by s.114(1)(e):

"(T)here is little doubt that under s.114(1) a party may seek an order for the restoration to him or her of property which undoubtedly belongs to the claimant. The very terms of s.114(1) which allows the court to make an order or injunction 'in relation to the property of a party to the marriage' indicates this".<sup>91</sup>

It may be thought that the decision of Elliott J. in Madjeric,<sup>92</sup> which was discussed in the previous section of this chapter, opens the way for one spouse to make a claim in conversion against the other at any time during the marriage. However, such an application would not

necessarily fall within the terms of paragraph (ca)(i) of the definition of "matrimonial cause", namely that the proceedings must arise out of the marital relationship. The mere fact that parties are married to each other does not give the Court jurisdiction to hear every dispute between them.<sup>93</sup>

The Australian Institute of Family Studies, in its survey of divorced couples, found that a high proportion of couples had held a joint bank account during their marriage.<sup>94</sup> It also found that, in about 30% of the cases in its survey,<sup>95</sup> one party, after separation, simply withdrew all of the money from the account without consulting the other party. It has recommended that the law be reformed to prevent this practice,<sup>96</sup> a clear example of theft from the other spouse.

### Summary

It may be seen, then, that the powers of the Family Court to provide a remedy where the basis of the finances of the other party to the marriage have been altered vary considerably. However, where the Court does have jurisdiction to hear the dispute, the discretion that it may exercise under the Act to make such order as it thinks fit enables it to tailor the remedy to suit the circumstances of the case.

### PART E

#### FAILURE TO CARRY OUT THE DUTY OF MAINTENANCE<sup>97</sup> OR TO MEET THE OUTGOINGS ON PROPERTY DURING THE PERIOD AFTER SEPARATION

As well as being underlain by the concept of contribution to the family and to the acquisition, maintenance and improvement of assets, Part VIII of the Family Law Act also directs the Court to look at the reasonable needs and present resources of the parties as a basis for financial adjustment. It is submitted that needs and resources have no less importance in the separation period than they hold in the period immediately after an order is made under Part VIII of the Act.

Therefore, a separated spouse with financial resources has an obligation to provide reasonable maintenance for the spouse with financial needs. Such needs will be particularly pressing if that spouse has the care of the children of the marriage.

That there has been a change from the common law position whereby the husband had an obligation<sup>98</sup> to maintain his wife and family is clear from McCall J.'s statement in Zappacosta<sup>99</sup> to the effect that conduct is now seen "... as relating to a fulfilment of (such) marital obligations as can be spelt out from the new family law".

Section 72 of the Family Law Act 1976 provides that a party to the marriage "is liable to maintain the other party, to the extent that the first mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately ..." and, by s.73, that "the parties to the marriage are liable, according to their respective financial resources, to maintain the children of the marriage who have not attained the age of 18 years".

A Court assessing the order as to maintenance which is "proper" (s.74) in all the circumstances of a case finds guidance from s.75(2), which, in paragraphs (a) to (f), (m) and (n), concentrates on the needs of the applicant, balanced with the ability of the respondent to pay. That is, prima facie, maintenance is assessed by quantifying the respective needs of each party to maintain a reasonable standard of living.<sup>1</sup> "Need" is interpreted to mean more than the basic necessities or a survival income,<sup>2</sup> customary lifestyle being a principal indicator.<sup>3</sup>

Therefore, when the Family Court is faced with a situation where the applicant for a property settlement under s.79 produces evidence that, since separation, the respondent has provided no maintenance, despite the fact that the applicant has lacked the financial means to adequately maintain himself or herself and the children of the marriage or, alternatively, that the applicant has borne all the outgoings on the property of the parties during the separation period, it is only reasonable that the financial detriment to the applicant should be taken into account.<sup>4</sup> The fact that the Court does so shows the close relationship between



"contribution" and "needs" that underlies Part VIII of the Family Law Act.

This approach is consonant with the view of the proper functions of the modern law of financial adjustment held in other jurisdictions,<sup>5</sup> namely that the law consists of two closely related parts, the distribution of assets and the creation and enforcement of obligations of support. The modern law is founded on a recognition that marriage is ultimately a partnership in which the relationship of the spouses is essentially co-operative. When the marriage breaks down, the re-allocation of assets and the formulation of support obligations are usually integral parts of the process of re-arranging family resources in a just and equitable manner.

Where, as in Szelley and Shelley,<sup>6</sup> the husband has accumulated assets partly because of his failure to maintain his family, then the wife should gain recognition when property division under s.79 takes place. Similarly, where one party, by the exercise of extreme thrift, has remained in the matrimonial home after separation, preserving the equity in it by paying all the outgoings, as in Mead,<sup>7</sup> where the wife took in boarders to assist her in meeting outgoings on the property and maintaining the children of the marriage,<sup>8</sup> then this is a fact or circumstance to be taken into account in the formulation of a property order.

Further, where a wife has been compelled to leave the matrimonial home because of a genuine fear of her husband and as a result has had to provide accommodation and sustenance for herself and her family of the marriage, this is an economic circumstance to be taken into account.<sup>9</sup>

On the other hand, the Family Court has been careful to emphasise in such a case that the respondent is not in any sense being punished in financial terms, for the applicant has not been given a greater share than that to which he or she would be entitled. What is being taken account of is the applicant's greater financial contribution to the assets of the parties.<sup>10</sup> It is on this basis that the decision in Mueller and Hegedues<sup>11</sup> can be justified. Smithers J. held that a father's single-handed efforts

in caring and providing for his three children, two of whom were handicapped, during a nine-year separation period should be taken into account. Because the case was decided before the 1983 amendments, it was not possible for the father's financial commitments to his children by way of feeding, clothing, accommodating and educating them and paying for domestic assistance to be viewed as contributions within s.79(4)(a) and (b) as then drafted. However, Smithers J. used the provisions of s.79(2) and s.75(2)(o) in order to recognise the very real contribution involved. The father's non-financial commitments such as general parental care and cooking and cleaning were taken into account under the same provisions. Although s.75(2)(o) is to be limited to facts of a broadly financial nature, the husband's burden in caring for the children had financial implications in that if he had not cared for them himself, he would have had to employ a housekeeper.

The Full Court in V. and G.<sup>14</sup> stressed that the respondent's capacity to pay maintenance is a factor to be taken into account.<sup>13</sup> As a logical consequence of this, it could be argued that the fact that a husband who has an obligation to provide for a wife and infant children but who, through sheer inertia, has failed to seek employment, is an economic circumstance which ought to be considered, although in the present economic climate it would be difficult to decide whether the husband would have gained employment had he sought it.<sup>14</sup>

The fact that the Family Court carefully balances various aspects of the parties' contribution to the acquisition, conservation and improvement of matrimonial assets is illustrated by the decision in Antmann.<sup>15</sup> After separation and until the house was sold, the husband continued to reside in the matrimonial home with one child of the marriage while the wife and the other child lived in rented accommodation. The trial judge found that, during the separation period, no repayment of mortgage instalments was made by either party. He held that the continued rent-free occupation of the matrimonial home by the husband required consideration in deciding the ultimate responsibility for the payment of the debts and obligations relating to the property. Accordingly, the husband was ordered to bear the brunt of the liability that had accumulated.

It appears that a party who has exclusive occupation of jointly-owned property has a prima facie obligation to maintain the property in repair,<sup>16</sup> although outgoings in the form of rates and taxes on jointly-owned premises should be shared equally during the separation period, unless there are special circumstances such as those which arose in Antmann.<sup>17</sup>

The normal date for the valuation of the assets of the parties is the date of the hearing rather than the date of the separation.<sup>18</sup> This is so even when an asset has increased substantially in value, for example due to inflation or re-zoning, between the date of separation and the date of the hearing.<sup>19</sup> There is an exception to this rule, however, where the asset has increased in value since the date of separation due substantially to the efforts and contributions of one spouse only.<sup>20</sup> In Williams v. Williams,<sup>21</sup> the High Court affirmed that contribution made after cohabitation had ceased is a matter to be considered by the Court.

Where, as described above, one party to the marriage has failed in his or her obligations to provide maintenance or has not met outgoings on property since separation,<sup>22</sup> the tendency of the Court has been to regard this as a circumstance which ought to be taken into account in the quantification of a property order. However, it has been careful to point out that the respondent is not being punished for matrimonial fault but rather for a lack of contribution to assets.

#### PART F.

#### THE MANIPULATION OF ASSETS TO REDUCE THE POOL OF PROPERTY AVAILABLE FOR DISTRIBUTION

Chisholm and Jessep<sup>23</sup> maintain that such cases as Tuck<sup>24</sup> and Abdullah<sup>25</sup> should not be seen as creating a new category of "financial misconduct", but as examples of the careful analysis that the Family Court gives to the contribution that the parties in fact have made to the acquisition of property. It is submitted that this view patently ignores conduct which amounts to a blatant attempt to deprive the other spouse of property interests which are rightfully his or hers, or to put the position more simply, conduct which

amounts to stealing assets belonging to the other party. Admittedly, by focusing on the innocent spouse's contribution, there is no need to make an assessment of the other party's misconduct. While this approach conforms with the notion that marital conduct should not be at issue where there is no-fault divorce legislation, it is submitted that the misconduct to be described in this section falls comfortably within the exception encompassing conduct with economic consequences laid down in Soblusky<sup>26</sup> and Ferguson.<sup>27</sup>

(a) The capacity of the Family Court to affect the interests of a third party.<sup>28</sup>

The manipulation of assets to reduce the pool of property available for distribution usually, but not always, involves a third party. The respondent<sup>29</sup> may allege that he or she has a debt to a third party or may arrange for the manipulation of the accounts of a partnership or family company or the obfuscation of his or her own financial arrangements. He or she may transfer a property interest for inadequate consideration or no consideration at all or relinquish control of all assets in his or her name to the Official Receiver in Bankruptcy by voluntarily declaring insolvency under the Bankruptcy Act 1966 (Cth.). Finally, through the virtual invulnerability offered by discretionary trusts and family companies, the respondent may place assets beyond the reach of his or her spouse, yet retain all control of them.

The involvement of third parties means that the outcome of s.79 proceedings may have a very real impact on them. For instance, a relative or a family company may have a claim to a proprietary interest in the matrimonial home,<sup>30</sup> or a claim that property orders should not be made which permanently or even temporarily affect their interests.<sup>31</sup>

It has already been shown in Chapter Five<sup>32</sup> that to vest property in a third party may be a very successful way of keeping it beyond the reach of a s.78 declaration or a s.79 order. As to partnerships, the Family Court may only declare the parties' respective interests in partnership assets; matters such as the appointment of a receiver of a partnership business<sup>33</sup> to order

the taking of particular accounts or to order the winding up of the partnership will fall to the decision of a Supreme Court.<sup>34</sup> Unless it can be recaptured by means of s.85<sup>35</sup> or through the Family Court's accrued jurisdiction, property which has been alienated by way of settlement in a discretionary trust or by a voluntary declaration of bankruptcy under the Bankruptcy Act 1966 (Cth.) also lies beyond the reach of the Family Court. Whether or not a particular dispute constitutes a "matrimonial cause", in which case the Family Court undoubtedly has jurisdiction to decide the matter, may be arguable, and for the husband and the wife to apply for a remedy with respect to the same dispute in separate jurisdictions is not surprising when one considers that the remedy given by a particular court may present distinct advantages to one party to that dispute.

Where a third party has not taken an interest in property bona fide and for good consideration<sup>36</sup> or has acted in collusion with the respondent<sup>37</sup> or where the trust or family company is merely a "sham" or a "device"<sup>38</sup> to enable the respondent to avoid his responsibilities under the Family Law Act<sup>39</sup> or it is a puppet of the respondent,<sup>40</sup> the Family Court has the power to ignore strict legal rights and substitute its own order.

Normally, where the property interests or claims of a third party might be affected by s.79 proceedings, the trial Judge will order that notice be served on that third party. The third party will then have the opportunity to choose to do nothing or to apply for leave to intervene under s.92 or to appear before the Court, the s.79 proceedings being adjourned in the meantime. The Full Court in Anderson<sup>41</sup> approved the application of the relevant High Court Rules (by operation of s.38(2) of the Family Law Act) so that third parties could be joined in proceedings even though they refused to intervene under s.92. This approach made available a valuable remedy to be used where third parties have participated in a scheme to defeat an existing or a proposed order of the Family Court. Further, the Court held that by applying the provisions of the Acts Interpretation Act 1901 (Cth.), it was possible to make ancillary orders against third parties joined in s.85 proceedings.<sup>42</sup>

As a matter of substantive law, there is no provision in the Family Law Act entitling an intervener who is not a child of the marriage to seek in his favour an alteration of property interests of the husband and wife.<sup>43</sup> However, Treyvaud J. in Wallace<sup>44</sup> indicated that the Family Court may properly assume jurisdiction to determine the issue between a husband and wife and an intervener under its accrued jurisdiction. Whether it will exercise its discretion to do so will depend upon the balancing of the relevant interests of the parties involved and the degree of connection between the respective disputes.<sup>45</sup> In its exercise of State power, the Family Court will be able to make binding orders against third parties whether or not they intervene or appear in s.79 proceedings. If a third party obtains leave to intervene in the proceedings so as to contest an "outside" issue or he or she is given leave to be heard in relation to such a matter,<sup>46</sup> it would be likely that the third party would be faced with an issue estoppel.<sup>47</sup>

(b) Notional debts to family members

The Family Court in a number of decisions has refused to take into account so-called debts to family members.<sup>48</sup> The wife's claim that her father's expenditure of \$14 000 on an extension to the matrimonial home was a loan was disbelieved in Antmann,<sup>49</sup> particularly since the father had occupied the extension for a period of time up until the time of his death. As a result, the sum was included in the assets to be divided.<sup>50</sup> The husband in Kimber<sup>51</sup> claimed that his son had participated in the purchase of a particular property, and that consequently he had been paid a proportion of the proceeds received from its sale, but Elliott J. found that the payment was designed "... to mask the full extent of his assets and income".<sup>52</sup> Therefore, the entire proceeds were taken into consideration when the property order was formulated.

The Family Court has considered that a debt to a third party should be ignored when it is unlikely that it will be enforced.<sup>53</sup> In proceedings as to property in af Petersens,<sup>54</sup> it appeared that the assets of the parties included share holdings in a company in which they were the only shareholders, a partnership between the husband and the wife and the proceeds of the sale of some land. The husband and his father alleged that certain debts were due to

the father from the company, the partnership and the parties themselves, although the wife denied that a loan was intended. If all the debts were established and paid, no assets for division between the parties would remain. The father was left to find his remedy, if he wanted one, from the Supreme Court.<sup>55</sup> The fact that the husband might in the future have to meet the debt to his father was taken into account, however, as also was the fact that the bulk of the parties' assets had been derived from the same source. Their assets were divided in the proportions of 40% to the wife and 60% to the husband.<sup>56</sup>

(c) The manipulation of company and partnership accounts

While it is usually quite easy to trace a fictional debt to friends or relatives and, in fact, quite reasonable for the Family Court to proceed on the assumption that all debts owed to friends and relatives are suspect until the respondent convinces it otherwise, unsympathetic spouses often manage to obfuscate their financial dealings with companies and partnerships to such an extent that it is difficult for the Court to recover the funds that have been filtered off.<sup>57</sup>

Findings were made in Garrett<sup>58</sup> that a substantial alleged debt of \$40 000 due from the family company to the husband was not in fact due. The inclusion of this sum in the quantification of the company's assets altered the value of the company and consequently the value of the wife's share in it. The fact that the husband had increased his loan account with the company by lending it money saved from his wages while the parties to a large extent lived on the wife's earnings made his claim particularly unjust. The husband's claim for a debt was based on manipulation of the company's accounts so that it appeared that he had made a loan to the company.

The manipulation of partnership accounts by the wife was considered by Nygh J. in Pickard.<sup>59</sup> His Honour stated that "... (t)o the extent that the wife has appropriated for her own use moneys or assets which belong to the parties jointly or to the husband solely, she is bound to make restitution. The same applies of course in reverse". The wife, in her capacity as bookkeeper for

her husband's pharmacy, acting with his tacit consent, had extracted money which she placed in bank accounts over which she had control. She argued that this raised a presumption of advancement from her husband or, alternatively, that the well-known principle applied that a man cannot turn around and say that his property was put in his wife's name simply for the purpose of evading taxation.<sup>60</sup> The wife further argued that the husband, in allowing her to draw the money out of the business and place it in her accounts, was party to an illegal conspiracy to defraud the Commissioner of Taxation. Therefore, she claimed, the principle of in pari delicto potior est conditio defendentis applied and the law would not enforce a claim to moneys accumulated in fraud of the revenue.<sup>61</sup> His Honour held, however, that any presumption of advancement is easily rebutted when assets placed in the sole name of one spouse are used or acquired for the joint use of both spouses.<sup>62</sup> Evidence had been given by the wife that she regarded both the savings account and the cheque account as joint accounts, the cheque account being used as a source of housekeeping moneys. It was not open for her to assert now that they were her sole accounts. The issue having been resolved by the rebuttal of the presumption of advancement, the questions whether the husband allowed money to be placed in the wife's accounts to evade taxation and whether there was any need to plead any alleged illegality did not arise.

The husband in Tuck<sup>63</sup> gave himself considerable financial advantages by manipulating accounts. Moneys which belonged to the partnership the parties had in a pharmacy were diverted by various means to the husband after the separation of the parties and invested for his sole benefit, with the result that, by the time of the hearing, there was a considerable imbalance in favour of the husband. The Full Court took account of the fact that the parties, both pharmacists, had started out as equal partners in the partnership and that the wife had made a contribution as a parent and homemaker. It was of the opinion that the manipulation of the accounts by the husband was a factor to be considered under s.75(2)(o), regardless of whether the wife had a remedy under the general law. As a matter of partnership law, every partner must account to the partnership for any benefit derived by him or her without the consent of the other partners from any use made of the



partnership property or business connections.<sup>64</sup> In this context, it is immaterial that the benefit was derived after the partnership has ceased to exist.<sup>65</sup> Therefore, the Full Court did not allow itself to be side-tracked from the realities of the situation in the case where Mr. Tuck had interposed corporate ownership between the original joint ownership of assets by the husband and the wife and their ultimate ownership by himself.

While the majority of the High Court in Re Ross-Jones; ex parte Beaumont<sup>66</sup> held that the Family Court could not make orders under pure partnership law for the appointment of a receiver for the purpose of winding up the partnership, paying creditors, the taking of accounts and so on, the High Court nevertheless held that the Family Court, either by way of injunction or under s.79, could make orders for the protection of the property of a party. By drawing on the powers granted to it by s.80, the Family Court, in formulating its order under s.79, could appoint a receiver. However, the receiver so appointed, the High Court said, would lack the powers of a receiver appointed by a State Supreme Court under Partnership legislation, for he would be unable to make a determination of claims made by other persons against the partnership.

Since the decision in Beaumont (supra.), however, there have been decisions of the High Court<sup>67</sup> concerning the accrued jurisdiction of Federal Courts and these have enabled an expansion of the Family Court's jurisdiction.<sup>68</sup> While a Federal Court will not exercise its jurisdiction over a non-federal matter if the "... federal claim ... is a trivial or insubstantial aspect of the controversy",<sup>69</sup> where a question about a partnership arises in association with a "matrimonial cause", it is arguable that the Family Court, in exercising its discretion to assume an accrued jurisdiction, could entertain an application for the appointment of a receiver to wind up a partnership under State Partnership legislation.

In Hayes,<sup>70</sup> it was pointed out that the Family Court's powers to declare partnership interests under s.78 or s.79 are incidental only, jurisdiction arising under paragraph (f) of the definition of "matrimonial cause" in s.4(1) rather than under paragraph (ca).<sup>71</sup> Further, any declaration made by the Family Court as to the parties'

respective interests in a partnership will not be binding upon third parties (s.78(3)).<sup>72</sup>

In his dissenting judgment in Ascot Investments Pty.Ltd. v. Harper and Harper,<sup>73</sup> Murphy J. referred to the fact that the evidence of the husband's extensive financial dealings with the family company over which he exercised effective control led to the inference (particularly in the light of his evasions and refusals to answer questions put to him) that he was channelling from the company to himself through another company known as Parkvale tens of thousands of dollars which he was spending on racehorses, gambling and other pursuits. The majority of the Court, however, refused to lift the corporate veil and the husband's machinations were unchecked.

Garrett<sup>74</sup> illustrates two further methods by which accounts may be manipulated so that the pool of assets is diminished. In order to minimise taxation the value of stock as disclosed on the balance sheets of the family company had been under-stated generally. The business actually yielded much greater benefit than the profit and loss accounts suggested. Further, by a system of "transfer pricing", the husband was able to move certain company capital offshore to Hong Kong. A company was set up in Hong Kong and used for the purpose of establishing credit there for taxation purposes. Shares in the company were held by a trust in which the husband and the two children (but not the wife) were beneficiaries and in respect of which the husband was the appointor. The benefits were obtained by ordering goods from suppliers from the office of an import company in Australia for the ultimate use of that company yet invoicing the goods to the Hong Kong company as purchaser. The Hong Kong company as seller then invoiced the goods to the Australian company at a higher price. The Hong Kong company had no employees in Hong Kong and profits accumulated there were subject to a tax rate of 15% only. According to counsel for the wife's submission, the net worth of the amounts held in Hong Kong was about \$86 000. The husband claimed there was \$10 000 less than this, but the Full Court held that the wife's counsel's submission was borne out by evidence and should be accepted. The sum was taken into account as a financial resource of the husband.

The Family Court may be able to deal with the situation where accounts have been manipulated, or there is a chance that property may be disposed of, by issuing a restraining injunction.

While it is "... a very serious curtailment of rights to deprive any person of the freedom to deal with his or her property as that person wishes",<sup>75</sup> and the Full Court in McCarney<sup>76</sup> realised this, a failure to impose any legal restriction on an unsympathetic spouse with property could easily frustrate a well-founded s.79 claim by the other spouse. It was made clear by the Full Court in Tansell<sup>77</sup> that, in appropriate circumstances, an injunction could be made under s.114(1) to restrain a spouse from dealing with his or her property until such time as an application can be made under s.79. Finally, in Sieling,<sup>78</sup> the Full Court, by a majority, adopted a realistic rather than a legalistic approach to the question. The majority, Evatt CJ. and Marshall J., took the view that during marriage, a spouse, as it were, gains "credits" towards a future application under s.79 to the extent that the criteria in s.79(4) are met. Such "incipient" or "inchoate" rights should entitle a spouse to an injunction to restrain the other spouse from dealing with his or her property until such time as an application could be made under s.79.<sup>79</sup> In reply to Asche SJ.'s dissenting judgment to the effect that it would be wrong to allow proceedings under s.114(1) to be determined by reference to a right of variation which has not arisen and may never arise,<sup>80</sup> the other two Judges held that an injunction could be discharged at a later date if it were found to be inappropriate. In the meantime, it would provide a safeguard for incipient rights under s.79. While the majority's statements were strictly obiter, they have been held since to correctly state the law on this subject.<sup>81</sup>

In Stowe,<sup>82</sup> it was established that, for a Sieling injunction to be validly imposed, "... there must be established an actual or potential claim enforceable under s.79 and a real danger that the claim may be defeated or prejudiced unless an injunction is granted" and the Court must also consider "... the probability of success of the applicant in the proceedings and the balance of convenience between the parties".<sup>83</sup>

The development of the equitable remedy known as a "Mareva

injunction" enables the Family Court to freeze assets which may be moved outside the jurisdiction just as a "Sieling" injunction allows it to control the disposition of assets within the jurisdiction. In just over a decade, since its development in the Commercial Court in London in the mid-1970's,<sup>84</sup> the Mareva injunction has become established as a powerful remedy to prevent respondents from frustrating judgments by removing or dissipating assets. Particular impetus for its development came with the increasing complexity of commercial dealings and the speed with which, by electronic transfer, bank balances can be transferred from one country to another or, locally, from one banking corporation to an entirely different one, in order to achieve anonymity and to put funds out of reach of a creditor. The Mareva injunction's potential in the matrimonial jurisdiction for controlling the financial machinations of a disenchanted spouse is obvious.

To obtain such an injunction, the applicant must persuade the Court in his or her evidence that the respondent is removing, or there is a real risk that he or she is about to remove,<sup>95</sup> assets from the jurisdiction to avoid the possibility of a judgment or that he or she is otherwise dissipating or disposing of assets in a manner clearly distinct from his or her usual or ordinary course of business or way of living so as to render the possibility of further tracing of the assets remote, if not impossible, whether factually or legally.

It is frequently obtained ex parte and it may be granted before the issue and service of proceedings upon a respondent. In effect, the Mareva injunction freezes the respondent's assets for the specific purpose of ensuring that, if and when the applicant gets his judgment, the assets will be available to satisfy that judgment. It therefore establishes priority over other possible creditors, contrary to the long-established tradition of English and Australian courts that to do this is impermissible.<sup>86</sup> However, English courts will freeze no more of the defendant's assets than the amount required to satisfy the eventual judgment debts.<sup>87</sup>

If a Mareva injunction is sought in respect of an asset which is identified with precision, as in the case of money in an

unidentified bank account, the Court may require the applicant to give an undertaking to pay the reasonable costs of a person other than the respondent in ascertaining whether any asset is his or her possession or control.<sup>88</sup> The injunction will not be granted if it is likely to affect a third party's freedom of action and/or freedom of trade.<sup>89</sup>

In relation to the admissibility of banking records for the purpose of establishing the true status of the respondent's financial affairs, whether for an injunction or any order under the Act, the Evidence Act 1905 (Cth.) "covers the field"; it excludes the provisions of the States' Evidence legislation and it applies to proceedings under the Family Law Act. A distinction must be drawn, however, between banking records simpliciter (for example, bank statements and records of banking transactions) on the one hand and the contents of a bank file relating to a customer on the other: the former are admissible but the latter are not.<sup>90</sup>

Where property and assets have been transferred overseas, the Family Court has no jurisdiction in respect of the title to or possession of that land or those assets.<sup>91</sup> If the Court has jurisdiction over the parties, it should take the existence of property abroad into account in contemplating what order should be made under s.79, although the decision in Garrett<sup>92</sup> suggests that it will be considered in the context of "financial resources" within the terms of s.75(2)(b). Whilst the Court can order a party over whom it has jurisdiction to transfer the title to property situated overseas as a matter of personal obligation, it cannot in the case of refusal have recourse to s.84.<sup>93</sup>

It is difficult to trace property held overseas where the spouse has taken adequate precautions. For example, people engaged in the travel industry occasionally collect their commissions offshore; employees of multi-national businesses sometimes receive a proportion of their salaries or other benefits overseas; and businessmen can often arrange for money to be left for them in overseas bank accounts. Generally, such hidden assets are unlikely to be detected.<sup>94</sup>

Hawkins<sup>95</sup> claims that accountants have reacted to the

increasing divorce rate by securing "... the business assets in such a way that the husband has control of those assets and control over the distribution of the income arising from those assets".<sup>95</sup> Response to the Australian Law Reform Commission's discussion paper, Matrimonial Property Law,<sup>97</sup> as well as to the Australian Institute of Family Studies' survey of divorced couples to analyse property and income distribution on divorce in Australia,<sup>98</sup> has indicated a widespread difficulty in obtaining information about a spouse's business assets.<sup>99</sup> The appointment by the Family Court of skilled auditors to investigate claims of non-disclosure or manipulation of accounts with the costs of such investigation being shared equally by the parties to the marriage from the proceeds of the property settlement made between them would be desirable.<sup>1</sup>

The Full Court in Poulos<sup>2</sup> considered the husband's contention that Maxwell J's findings as to the way in which he had moved assets around to suit his interests and convenience were not open to the Court because these matters were not put to him in cross-examination so as to give him an opportunity to answer them. The trial judge had found that the husband had not only manipulated assets between companies and a family trust to meet whatever purposes he had at hand but also, once the wife brought a property application before the Court, he had tried to distance himself from the companies, relying on the legal entitlements of the shareholders<sup>3</sup> in order to minimise the assets available for the settlement of property in favour of his wife.<sup>4</sup> Maxwell J. was also of the opinion that the husband might well have siphoned off funds and that these would become available to him once the danger of the proceedings had passed. The Full Court held that the extent of the parties' involvement in the companies and the trust and the way in which the assets of these entities were used were clearly relevant to the ultimate decision of the Court, so that the failure to cross-examine on particular aspects of the movement of assets was not a breach of natural justice.

(d) Transfer of property for inadequate consideration or for lack of consideration

Transfer of property for inadequate consideration or for no consideration at all is another means by which the pool of property

available for distribution is diminished.<sup>5</sup> The husband in V. and G.,<sup>4</sup> notwithstanding an order restraining him from dealing with or disposing of his interest in the matrimonial home, he then being sole owner, had transferred a half-interest in the home to his second wife. The trial judge had set aside the disposition under s.85 as being likely to defeat the wife's claim for a property settlement. The Full Court approved<sup>7</sup> his decision to do so, and added that since the transfer had been made in breach of an injunction, the Court had the power in any case to set aside the transaction. There are obiter dicta to the effect that this would be so where no consideration had passed, although, of course, the consideration provided by the second wife's marriage to the respondent was sufficient in the case before the Court.

There was evidence in Cullen<sup>8</sup> that the transferee would later return the disposition at the disponent's convenience. The wife, after separation, executed transfers of her interests in two properties, one of which was the matrimonial home, to her mother. The husband applied for, and was granted, an order to prevent the mother from lodging the transfer of the wife's interest in the matrimonial home for registration. According to Jowitt's Dictionary of English Law (1959),

"The terms 'disposition' and 'devolution' comprehend and exhaust every mode by which property can pass, whether by act of the parties or by the operation of law".

It is clear that for a disponent to retain any interest in the property purportedly disposed of is to nullify the so-called disposition. Therefore, the purported transfers made to the wife's mother in Cullen<sup>9</sup> and to Mr Jaya in Abdullah<sup>10</sup> were shams and the transactions conferred no interest.

(e) Severance of a joint tenancy<sup>11</sup>

Since a property held as a joint tenancy is in law and equity held in equal shares, whatever the level and source of contribution,<sup>12</sup> and the principle of jus accrescendi applies as between the joint tenants, obviously the severance of the joint tenancy<sup>13</sup> will hold

attractions for a spouse who has become disenchanted with his or her partner and who wants freedom of testation regarding his or her interest in it.

Because of the important advantages offered by a joint tenancy,<sup>14</sup> to effect severance, certain rules must be followed.<sup>15</sup> Severance by mutual consent<sup>16</sup> will be of no concern in the present context, except, of course, where one party's will has been overborne by duress exerted by the other,<sup>17</sup> in which case a remedy is provided by the provisions of s.79A(1)(a) of the Family Law Act.<sup>18</sup> A joint tenant may operate upon his own share so as to create a severance of that share by an inter vivos disposition; a party may seek an order for sale and partition under State partition and sale legislation<sup>19</sup> or more likely, since the 1983 amendments to the Act, under the provisions of Sections 78 and 79 of the Family Law Act,<sup>20</sup> or severance will be effected by a course of dealing inconsistent with the notion of joint tenancy. Severance of a joint tenancy by alienation can be effected by one joint tenant without the consent, or even the knowledge, of the other.<sup>21</sup> For the other spouse who has a claim based on contribution under s.79(4)(a), (b) and (c) for a share of the joint assets greater than fifty percent, alienation clearly amounts to the making of an instrument or disposition which is designed to defeat an anticipated order in s.79 proceedings. Provided that the requirements of s.85(1) are met, and that the interests of a "bona fide purchaser or other person interested" can be protected, the Family Court can provide a remedy.<sup>22</sup> The Family Law Amendment Act 1983, by amending the definition of "matrimonial cause" in paragraph (ca) of s.4(1) of the principal Act, has extended the jurisdiction of the Family Court<sup>23</sup> in its application of the provisions of s.85. Provided that proceedings in relation to property "arising out of the marital relationship" are brought concurrently, a party can apply to have the disposition set aside without having to wait until principal proceedings can be taken. The Family Court can order the disponent/third party to execute a transfer of property or discharge a mortgage if the disposition has been set aside under s.85.<sup>24</sup> Should the disponent/third party fail to comply with such an order, then a Registrar of the Court may be authorised to execute the document on his or her behalf under s.84.<sup>25</sup> However, to obviate the need for a spouse to make an application to the Family Court for relief where the other spouse has alienated his or her share in a joint tenancy, it is submitted that the enactment



of legislation similar to that introduced in Saskatchewan is desirable. The Saskatchewan legislation deprives a joint tenant of his or her freedom to alienate his or her interest by requiring that no instrument shall operate to effect the severance until it is registered and that no instrument purporting to transfer the share or interest of a joint tenant shall be registered until it is accompanied by the written consent of the other joint tenant.

A joint severance will not be effected by a unilateral expression of intention,<sup>26</sup> nor by one party's drafting a will attempting to devise his or her interest in a joint tenancy. It has recently been held that one joint tenant may sever a joint tenancy by means of a unilateral declaration of intention communicated to the other joint tenant<sup>27</sup> or by one joint tenant executing a form of transfer transferring his or her share of the joint tenancy to himself or herself as a tenant-in-common.<sup>28</sup> However, should such a disposition be designed to defeat an anticipated order under s.79, it will be vulnerable to proceedings taken under s.85 (supra.), if such are available. A joint tenancy will be severed by any course of dealings which are detrimental to its value<sup>29</sup> or inconsistent with the notion that the property is held in equal shares. A sale of property under the writ of fieri facias would therefore sever the joint tenancy, the purchaser taking the interest as a tenant-in-common.

(f) The filing of a debtor's petition under the Bankruptcy Act 1966 (Cth.)

If a party to a marriage is bankrupt, no property application may be brought against the bankrupt, since all the bankrupt's property, save for limited exceptions, has been vested in the Official Receiver in Bankruptcy.<sup>30</sup> However, since an early or an earlier discharge from bankruptcy, in all the circumstances, may constitute a desirable objective and be "for the benefit of" a party within the terms of s.79(1), a claim for a property settlement under the Family Law Act is not of such a nature as to vest in the bankrupt's Official Receiver.<sup>31</sup> Anomalously, a maintenance agreement which has been registered under s.86 of the Family Law Act can defeat creditors under the Bankruptcy Act 1966 (Cth.), s.123(6) of which provides that nothing in that Act invalidates a transfer, disposition or assignment in respect of a registered maintenance agreement.<sup>32</sup>

The effectiveness of filing a debtor's petition under the Bankruptcy Act so that the whole of the debtor's assets vest in the Official Trustee in Bankruptcy is illustrated by the result in Moncada.<sup>33</sup> In November, 1980, the Family Court ordered the husband to pay \$35 000 to the wife by way of property settlement within one month. The sum was not paid, and in March, 1981, the husband put all his assets beyond his control by vesting them in the Official Trustee. The wife brought contempt proceedings in the Family Court, but while Baker J. found that he had jurisdiction to hear contempt proceedings and that the order of the Family Court made in November, 1980, was a judgment debt and enforceable as such, he held that the debt was provable under the Bankruptcy Act. Therefore, pursuant to s.58(3) of that Act, it was not competent for the wife to enforce any remedy against either the person or the property of the bankrupt husband in respect of the Family Court of Western Australia's order. This was the case even though the debtor's petition was clearly a sham,<sup>34</sup> for Ferrier J. in an earlier hearing had found that the husband had either in his possession or under his control assets in the vicinity of \$70 000. In an obiter statement, however, Baker J. said that had the wife wished to proceed to enforce an order for maintenance, the Family Court could have provided a remedy under Part XIII of the Family Law Act provided that the amount of the arrears which had accumulated pursuant to the order had been specified with particularity and provided that the maintenance order had been registered in the Family Court by the filing of a sealed copy.

Wallmann<sup>35</sup> illustrates an ingenious, but unsuccessful, attempt to avoid the consequences of a respondent's bankruptcy. Counsel for the wife submitted that the binding of the doctrine of lis pendens on the Official Trustee, in whom all the husband's property had been vested under a sequestration order, prevented any ouster of the Family Court's jurisdiction to proceed with the hearing of a property application under s.79. However, the Court held that, since the Family Court's powers to alter property interests are purely discretionary, an application for property settlement under the Family Law Act is an action in personam and not in rem, and therefore the doctrine of lis pendens does not apply.

As to a subsequent bankruptcy, Nygh J. held in Whitaker<sup>36</sup> that the Family Court's powers to "restrain the making of an instrument or

disposition by or on behalf of, or by direction or in the interests of, a party" under s.85(1) or, by the use of s.114(3), to restrain a disposition of the property concerned by a third party in a case not directly falling within the provisions of s.85(1), are not defeated or superseded. However, while the Family Court has a discretion under s.85 to set aside an assignment of property to a trustee under Part X of the Bankruptcy Act,<sup>37</sup> the Full Court observed in Milland,<sup>38</sup> in which the wife had complained that the Deed of Assignment was "a property settlement avoidance scheme", that it must consider

"... the consequences to the debtor (which could involve sequestration of his estate); the position of creditors; the question of delay; the question as to whether (the applicant) had a suitable remedy under the Bankruptcy Act 1966; notification of creditors; the fact that the Family Court would be intruding into a field of law normally the province of another court; (and) the fact that there must be a significant benefit to result to the applicant under s.85".

The Deed was, in fact, set aside, the Full Court observing that the Bankruptcy Act 1966 (Cth.) did not give the Federal Court exclusive jurisdiction over Deeds.

It should be noted that sections 222, 236 and 242 of the Bankruptcy Act 1966 (Cth.) provide a limited basis for setting aside a deed or debtor's petition provided that the Bankruptcy Court is satisfied that terminating the deed would be in the interests of creditors. The interests of a spouse who is a maintenance creditor, or a putative creditor, under s.79 of the Family Law Act are not recognised. In fact, the bankrupt's spouse is prohibited from voting at the creditors' meeting held to decide upon a Deed of Arrangement, despite the fact that the decision taken will affect his or her standing in the capacity of a creditor.

In Holley,<sup>39</sup> the Full Court pointed out that "each case depends on its own facts and the court cannot ignore such laws as s.111 of the Bankruptcy Act and the policy underlying it, nor should it disadvantage creditors, unless it be for very good reasons".<sup>40</sup> Further, in the exercise of its jurisdiction under s.85(1), the Family Court

lacks the power to upset any change of ownership resulting from the exercise of the jurisdiction of the Bankruptcy Court.<sup>41</sup> In other words, in such a case, the transfer of assets to the Official Trustee in Bankruptcy has not taken place by the volition of a party to the marriage but as a statutory consequence of that spouse's ordered sequestration under the provisions of s.58(1) of the Bankruptcy Act 1966 (Cth.).

It should also be noted that where a consent or contested order is made under s.79, it may be subsequently set aside if the transferor under that order becomes bankrupt. Under the Bankruptcy Act, the trustee in bankruptcy can avoid transactions entered into with the intent of defrauding creditors;<sup>42</sup> settlements made without consideration or in consideration of marriage;<sup>43</sup> transfers of property which have the effect of giving a creditor a preference or advantage over other creditors;<sup>44</sup> and transfers of the bankrupt's property which have no effect due to the trustee's title relating back.<sup>45</sup>

While debts comprising of moneys payable under property orders are provable in bankruptcy under s.82(1) of the Bankruptcy Act 1966 (Cth.), as a matter of legislative policy the claims of some creditors against a bankrupt's estate are given the right of prior payment. "Priority claims" include a claim of an employee for unpaid wages or leave entitlement. "Deferred claims" are those claims which are deferred from payment to the general body of creditors. While it might be expected that a spouse's claim to an equitable interest in property, the legal title of which was vested in the other spouse prior to his or her bankruptcy, would be given special treatment, in fact such a claim is deferred to the interests of other creditors. The quite lawful actions of a secured creditor against the property and the payment of priority claims and the debts owed the general body of creditors may leave little, if anything, for the spouse applicant.<sup>46</sup> Unless a spouse without a legal interest is able first to obtain a property order, or at least an injunction to restrain the making of a disposition, bankruptcy effectively puts the property beyond the reach of the Family Court. The inclusion of paragraph (ca)(i) in the definition of "matrimonial cause" in s.4(1) has remedied the situation where a spouse had to wait for principal proceedings before an order relating to property interests could be made, however.

Shiff and Waters<sup>47</sup> make the point that if inchoate rights to matrimonial property were declared to be rights in rem rather than in personam for the purposes of proving them in bankruptcy, no real advantage would accrue to the debtor's spouse. Section 79 requires an assessment of the property and respective financial resources of the parties before redistribution. Therefore, the assessment of the provable debt under s.79 cannot take place until all other debts are proven in bankruptcy and, arguably, the period prior to discharge estimated. The Court exercising powers under s.79 is in the position of standing behind all creditors and looking forward to property that will be surplus, or in reversion, before it can estimate the provable debt.<sup>48</sup>

It may be in the interests of a solvent spouse to claim a proprietary interest in the bankrupt's property under ordinary common law principles by making an application to the Federal Court of Bankruptcy.<sup>49</sup> If successful, such a claim would effectively reduce the bankrupt's estate, for a proprietary claim would rank above the claims of unsecured creditors.

The degree of success for the claimant at common law is dependent on the categorisation of common law and equitable remedies such as express, resulting and implied trust, implied contract, proprietary estoppel, unjust enrichment, restitution and quantum meruit as either "proprietary" or "personal" in nature. If the remedy is categorised as proprietary, the claimant will usually be compensated in full from the apparent assets of the bankrupt's estate in preference to unsecured creditors. Otherwise, the claimant spouse will only stand as the equivalent of an unsecured creditor.

It seems irrefutable that legislative reform is required in order to protect the interests of the bankrupt's spouse. Registration of the equitable interest of a non-titled spouse under the Matrimonial Homes Act 1967 (U.K.) has not proved to be effective in protecting that interest. On the other hand, it would not be unreasonable to demand that the signatures of both spouses be obtained for any hire purchase or similar secured loan agreements.<sup>50</sup> The disadvantaged spouse could not then be heard to complain unless he or she could show that consent to the loan had been obtained by fraud or duress.<sup>51</sup> As for unsecured personal debts incurred through

the use of store accounts or bank credit cards, the introduction of a statutory "protected interest" would safeguard a non-debtor spouse's interest in the matrimonial home or the debtor spouse's estate generally. New Zealand legislation provides a model for such protection. There, each spouse has a protected interest in the home (currently up to the value of \$21 500) which is not liable for the unsecured personal debts of the other spouse. On bankruptcy of a spouse, after debts secured on the home and any unsecured debts (other than personal debts) have been paid, the amount of the protected interest, or so much of it as remains after paying those debts, is paid to the other spouse.<sup>52</sup> It is submitted that this approach, despite the difficulties involved in setting the value of the "protected interest" because of the enormous differences from one State to another in the cost of private housing or the availability of public or private rented accommodation,<sup>53</sup> rather than the alternative of postponing the realisation of the bankrupt's interest in the matrimonial home in order to protect the interests of his or her family, would better serve to emphasize to a potential debtor that he or she has a responsibility not to disadvantage the other spouse by incurring debts that are beyond his or her capacity to pay.

It is also arguable that the interests of creditors should not be viewed in isolation from those of the non-titled spouse and society as a whole but rather balanced against them.

It is unquestionable that general creditors deserve to be repaid. However, the interests of an unsecured creditor are subject to the rights of secured creditors in specific property of the debtor and to statutory rights under the Bankruptcy Act 1966 (Cth.). Just as those priorities have been entrenched in the law as a result of various policy considerations, so the priority of a non-titled spouse over non-secured creditors of the other spouse should be established in the light of current social policies which stress the importance of the family.

In operating a business, a general creditor must assume a certain element of risk. For instance, he faces potential loss where a debt is neither repaid nor otherwise recovered. Even if a debtor has assets at the time he obtains credit, there is no obligation on his part not to dispose of or encumber them. Therefore, the sensible

general creditor demands higher interest rates to compensate for his greater risk.

Marriage, on the other hand, is not to be seen as a business venture. It does not involve the assumption of financial risk in return for a profit. A spouse's equitable interest in matrimonial property ought not be treated as if it were a result of a commercial undertaking. For a separated spouse with the care of young children who is not gainfully employed, the loss of that equitable interest can be quite devastating while the same loss to general creditors can be more easily sustained.

Where it is important to preserve the matrimonial home in order to house the bankrupt's family, the imposition of a restraint upon its sale would be of greater value than the protection of the equity in the matrimonial home through the introduction of a statutory "protected interest" of the type described above. The British Review Committee on Insolvency Law and Practice (The Cork Committee)<sup>54</sup> recommended that the new English Insolvency Act 1985 should extend the powers of the Court to postpone the sale of the matrimonial home where the title is in the name of one spouse only. It recommended that only where there are no dependent children or the non-titled spouse has made an informed consent in writing should sale of the matrimonial home be made without application to the Insolvency Court. The Report defines a matrimonial home and sets out the social and financial circumstances to be taken into account by the court in exercising its discretion. It also provides for the situation where the matrimonial home is already the subject of matrimonial proceedings: in such a case, any claim relating to the property should remain with the Family Division with the trustee having a right to be heard.<sup>55</sup>

To allay criticism that a debtor and his family could luxuriate in over-adequate housing at the expense of creditors, the Government published a White Paper in February, 1984, after the passage of the Insolvency Bill through the Committee Stage of the House of Lords. In this, the factors a court must consider when contemplating an order for postponement are set down with more particularity. For instance, the court is directed to consider the prospects of the applicant securing alternative accommodation, either from income or from other sources such as local authority housing. Also to be considered is the

extent to which an applicant is implicated in the bankruptcy and the extent to which the house itself has been acquired or improved with funds or benefits provided by unsecured creditors. The Cork proposals have therefore been revised in order to provide protection for the more needy applicant without disadvantaging creditors more than absolutely necessary.<sup>56</sup>

(g) The use of discretionary trusts and private companies

Discretionary trusts and private companies form another potential means of manipulating assets to reduce the pool of property available for distribution between the parties to a marriage.<sup>57</sup> The terms of the trust instrument or the Memorandum and Articles of Association of the company may give the appointor/trustee or the managing director no apparent legal control of the entity, for to settle property on trust or to put capital into the establishment of a company is to alienate the property or capital concerned, yet the person acting in either capacity in actuality may (and probably will) exercise a very real control over the trust or the company and its business. For example, the Family Court cannot intervene where a respondent establishes a trust to which he lends money, which in turn is invested in the trust. This "loan" is paid out to the respondent for his daily living needs, leaving the applicant no right to the trust assets, for the Family Court will not enforce a debt owed by a third party. Also, benefits may come to that person by the use of the assets of the entity or through the distribution of its income.

To a certain extent, the Family Court has broken down the strict legal entities involved in discretionary trusts and family companies in order to view the property of the trust or company as property over which a spouse has de facto control.<sup>58</sup> and which, therefore, may be treated as "property" within the definition in s.4(1) or as a "financial resource" within the terms of s.75(2)(b).<sup>59</sup> If a perusal of the documents establishing the discretionary trust or the family company show that a spouse has independent legal control of trust assets for his or her benefit, then this is a "property interest" and it is possible that an order under s.79 directly affecting it can be made. If the spouse's independent legal control for his or her benefit is subject to conditions or uncertainties, then that is only a potential "financial resource", which may be taken into account in the



formulation of a more general order under s.79,<sup>60</sup> be it an order for division of property or the payment of a lump sum. Under s.79, the Family Court can provide that an order for the payment of a lump sum may be satisfied by the transfer or settlement of property not necessarily owned by, but under the control of, the respondent. In Stowe,<sup>61</sup> the Full Court referred to this method of payment as an "indirect recourse" to assets. A lump sum order made under s.79 need not be directed at any particular property of the respondent<sup>62</sup> but the original application must relate to particular property of the respondent; an application at large for a lump sum order under s.79 would be misconceived.<sup>63</sup> Only where the Court has determined that the applicant has a claim to some alteration of interests in his or her favour can it then decide that the claim ought to be satisfied by payment of a lump sum.<sup>64</sup>

Financial resources may involve a third party's property over which the resource-holder exercises either legal or de facto control from which he or she is eligible to benefit in the future.<sup>65</sup> However, the recent decision of the High Court in Re Ross-Jones and Marinovich; ex parte Green,<sup>66</sup> which will be discussed later in this section, has placed curbs on the Family Court's powers to make restraining orders in relation to discretionary trusts and family companies, particularly with respect to the latter.

The trust instrument which gives the trustee<sup>67</sup> a "mere power" actually concedes him or her a great deal of control over the trust, particularly if he or she also has the power to appoint to himself. A trustee with a mere power has the discretion to determine not only how the distributable assets of the trust are to be divided among the objects of the trust but also whether they will be distributed among the defined range of beneficiaries. Pending any valid distribution, the trust property is held on a fixed trust for a person or for persons referred to as the taker or takers in default of appointment. Should the taker in default not be named in the trust instrument, then the trust property is held on trust for the settlor of the relevant property. In contrast is the position of the trustee who has a "trust power". He or she is directed to distribute the trust property, his or her discretion being confined to determining the manner in which distribution is to be effected among the objects of

the trust. In such a case, there is no taker in default of appointment as no failure to appoint is contemplated.<sup>68</sup>

The Family Court in certain circumstances has power to provide a remedy to an applicant who claims to be at a financial disadvantage because of the respondent's control over a discretionary trust. If the respondent is named in the trust instrument as a trustee with a power to appoint to himself or herself, he will be treated as having a "financial resource" within the terms of s.75(2)(b), the value of the resource depending on whether the power is exercisable by the spouse alone or whether he or she must act in concert with other trustees.<sup>69</sup> He or she will also be seen to have a "financial resource" if, in a non-fiduciary capacity as an object of the discretionary trust, he or she has the power to revoke the trust in his or her own favour or to replace the trustees, the value of the resource being assessed as the value of all remaining distributable trust property.<sup>70</sup> If the respondent is named in the trust instrument as the taker in default of appointment, he or she has a recognised proprietary interest amounting to "property" within the terms of the Family Law Act.<sup>71</sup> On the other hand, the settlor retains no "property" or "financial resource" since he or she is regarded as the disponent of the relevant trust assets. Moreover, if the trustee has no power to appoint to himself or herself, while he or she has "property" in the form of a legal interest in trust assets, he or she holds nothing of relevance from the Family Court's point of view as, in the strict legal sense, the interest carries with it no corresponding right of beneficial enjoyment.<sup>72</sup>

Where a respondent to proceedings under s.79 has "property" or "financial resources" under a discretionary trust, an applicant may establish a contribution to the relevant "property" or "financial resource" in proportion to the extent to which he or she can establish a contribution in respect of the trust assets themselves.<sup>73</sup> In Matuszewich,<sup>74</sup> Barblett J. held that the wife had a continuing right to claim from her husband the moneys held on trust for her and wrongly converted by him to his own use. That this tracing technique is appropriate is confirmed by paragraphs (a) and (b) of s.79(4) which expressly provide that it is immaterial that property in relation to which a party has made a contribution has, since the making of the contribution, ceased to be property of the parties or either of them.

If the applicant cannot identify or trace trust assets in the mass of assets, he or she will only be able to pursue the trustee as a creditor and will be in no better position than other creditors should bankruptcy arise. Domestic contribution under s.79(4)(c) need bear no relation to the acquisition of property held by the respondent, and, provided that the applicant wife can show a contribution within the terms of the paragraph, she may be able to establish a substantial claim in respect of the respondent's property under the trust. That the spouse's contributions to property and financial resources are relevant is expressly provided by s.75(2)(j), incorporated in s.79(4) by sub-section (4)(e).<sup>75</sup>

When he or she becomes aware that the marriage is about to break down, the respondent may transfer assets to a discretionary trust, the transfer being completed before the parties have separated and perhaps long before the other spouse applies for a financial order under Part VIII of the Family Law Act. The Family Court has power to set aside the trust instrument or the disposition of assets if it can be shown to have the effect of defeating an anticipated order of the Court. It is immaterial that the disposition was made long before the proceedings seeking the orders under s.79 were commenced,<sup>76</sup> or that the transaction occurred before the Family Law Act came into effect.<sup>77</sup> Under s.85, a transaction which is likely to defeat any such order can be set aside "irrespective of intention". The elimination of intention as a pre-requisite for the operation of s.85 by the inclusion of this phrase has enabled the Court to focus its attention on the effects that the impugned transaction has had rather than the purpose for which it was entered into. Even if the instrument or disposition sought to be set aside was not made by the respondent, it still may be caught by the provisions of s.85, for the section also applies to dispositions "made in the interests of a party". If the trust takes the form of an ante- or post-nuptial settlement, it may be possible for the Family Court to make an order with respect to the application of the whole or part of the property dealt with by the settlement by acting under the provisions of s.85A.<sup>78</sup> Provided that the Court adheres to the principle in Meller v. Meller,<sup>79</sup> whereby it was held that a Family Court may not divest children of capital assets but must re-arrange them into assets of equal value, its discretion to make an order in such a case will be very wide, since no third parties' interests are involved. Should

the disposition be set aside under s.85 and the trust be wound up pursuant to the Court's powers under s.80 (for example, s.80(e) gives the Family Court power to appoint or remove trustees), the pool of property available for distribution will be considerably augmented.<sup>80</sup>

A discretionary trust set up by the husband to minimise taxation with no intention of avoiding any claim made under s.79 by the wife may nevertheless be dealt with by the Family Court if the terms of the trust instrument give the trustee a discretion as to both capital and income to benefit the husband and the wife and the infant children. It is not for the husband to claim that he cannot meet a claim for maintenance or property provision because all his assets and income have been disposed of by the trust instrument, for the trust fund can still be described as family property. Before the trust property can be apportioned, the interests of the children in the fund will have to be protected by turning them into something of equal value. The Family Court might notionally divide the fund in equal shares according to the number of beneficiaries under the principle that "equity is equality",<sup>81</sup> then give each child a vested interest in the beneficial share. Once the children's interests have been quantified, the Court will be able to proceed with an assessment of the spouses' respective contributions to the remainder of the fund. Further, if the Court establishes that the assets of the trust were acquired by reason of a disposition made by "direction of or in the interest of" the husband and the disposition "is likely to defeat" the order being sought by the wife, the whole trust instrument is likely to be set aside under s.85.<sup>82</sup>

For the purposes of the Family Law Act, a spouse's shareholding in a company or trust is deemed to be the property of that spouse.<sup>83</sup> However, to value a shareholding in a private company whose success depends on the entrepreneurial skills of the individual in control or in the situation where shares have particular voting or managerial powers attached to them proves to be difficult. Valuation methods which have been developed for commercial purposes do not take into account the value of the shares to the spouse who has control of the company after a divorce, for they do not take into consideration the company's potential

for capital growth nor the benefits which that spouse will be able to derive from it. As a consequence, for the other spouse there is the loss of an opportunity to share in the future benefits of that shareholding. In more sophisticated corporate or trust structures, the controlling party may rely on less formal means of maintaining control and therefore he or she will not hold any interest which can be described as property. In such a case, it is an easy matter for the controlling party to dispose of the interest if marriage breakdown impends. It is clear, then, that while the Family Court can thwart some attempts to minimise responsibility under a property or financial order by deeming company or trust shareholdings to be the property of a party to the marriage, in many cases the nature of the shareholding is such that it is beyond the Court's reach.

The Family Court has a power under s.114(1) to direct a party not to dispose of certain property when he receives it<sup>84</sup> or not to exercise a power in such a way as to affect the applicant adversely.<sup>85</sup> Third parties may not be restrained under this provision, however,<sup>86</sup> and proceedings under s.114(1), being founded on paragraph (e) of the definition of "matrimonial cause" in s.4(1), must involve "circumstances arising out of the marital relationship". However, it is arguable that a contest between the parties to a marriage regarding the use by one spouse of the powers held under a discretionary trust in a manner detrimental to the position of the other spouse under that trust involves "circumstances arising out of the marital relationship".<sup>87</sup>

In Tansell,<sup>88</sup> the Full Court pointed out that, unlike the position under s.79, where the Court may, if it thinks fit, alter rights to property interests, s.114(1) provides for property rights to be affected or regulated, but not altered. Injunctions are made irrespective of whether the title to the property is in the husband or the wife, in the applicant or the respondent, or in both. Section 114(1) orders and injunctions are personal in that they are concerned not so much with the ownership of property as with the way that spouses deal with it. So long as orders do not make an alteration of property rights, they may have an indefinite duration.<sup>89</sup> Whether an impermissible alteration of property rights has been effected is to be answered by reference to the law of real

and personal property. However, the duration of the orders will be fixed by the commencement of a hearing in proceedings for property division. Should such proceedings not be instituted, the orders or injunctions may be determined.<sup>90</sup>

It appears that, in an appropriate case, the Family Court, acting under s.114(1), can temporarily restrain a spouse from exercising his powers as a trustee to the detriment of the other party to the marriage. Since the decision of the High Court in Re Dovey; ex parte Ross,<sup>91</sup> the Family Court has proceeded on the basis that, acting under s.114(1), it may direct the manner in which a fiduciary exercises his powers even if the interests of others (apart from the fiduciary's spouse) are indirectly affected (but not defeated)<sup>92</sup> as a consequence.

Nothing that was said by the High Court in Re Ross-Jones and Marinovich; ex parte Green<sup>93</sup> affects the Family Court's approach to the situation where the spouse effectively controls the trust entity.

When property or maintenance proceedings have commenced, under the provisions of s.114(3) the Court can restrain dealings in property which would affect claims made under the Act.<sup>94</sup> The High Court in Ascot Investments Pty. Ltd. v. Harper and Harper (Ascot Investments),<sup>95</sup> however, denied that the Family Court may make an order under s.114(3) against a third party to impose on that third party a duty which the party otherwise would not be liable to perform,<sup>96</sup> even though it has a power pursuant to s.114(3) "... to make an order or injunction which is directed to a third party or which will indirectly affect the position of a third party".<sup>97</sup> The Court distinguished between an order against a party to a marriage "... to do whatever is within his power to comply with an order of the court, even if what he does may have some effect on the position of third parties" and an order to third parties "... to do what they are not legally bound to do".<sup>98</sup> As to the decisions in Sanders v. Sanders<sup>99</sup> and Antonarkis and Anor. v. Delly and Anor.,<sup>1</sup> which approved the use of a provision similar to s.114(3) in the Matrimonial Causes Act 1959 (Cth.) to restrain third parties, it was demonstrated that neither decision could be held to be authority for adversely affecting the rights of

third parties by the exercise of the matrimonial jurisdiction for in neither case did the injunction concerned directly affect their substantive rights.<sup>2</sup>

The result of the decision in Ascot Investments is that

"(the) Family Court must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it".<sup>3</sup>

The restrictions imposed on the Family Court in Ascot Investments<sup>4</sup> in its dealing with third parties concerned not a discretionary trust but a family company, but the principles were laid down apply equally to trust entities. Therefore, any interference under s.114(3) with the trustee's control over trust property, or any discretion in relation to it, would be contrary to the High Court's ruling.

Notwithstanding the decision, the Family Court reconstructed its jurisdiction in relation to both discretionary trusts and family companies in order to protect the needs of the family. On the authority of an earlier High Court decision, Re Dovey; ex parte Ross,<sup>5</sup> the Family Court, in any case, was empowered to make orders against third parties which would indirectly affect their interests. In Re Dovey,<sup>6</sup> an injunction was granted to a wife, restraining her husband from exercising his vote as a director and a shareholder of a company which was the legal owner of the matrimonial home. The company was owned by both spouses but only the husband's shares carried any voting rights. The High Court upheld the order on the basis that the order did not prevent the third party company from dealing with its own property; it was directed not against the company but against the husband, who was a party to the marriage, even though he was also a shareholder and director who controlled the company. The effect on the third party was therefore indirect.

In Ascot Investments,<sup>7</sup> the High Court had overturned a decision of the Full Court whereby the directors of the company,

who were not parties to the marriage, were ordered to register a transfer of the husband's shares to the wife to secure the payment of a lump sum maintenance order in her favour. The High Court ruled that such an order amounted to a permanent interference with third parties' rights. The Family Court took the view that the ruling could be confined to orders of a permanent nature, and, until the High Court's decision in Re Ross-Jones and Marinovich; ex parte Green,<sup>8</sup> it felt empowered to make interim orders against third party creditors, family companies and discretionary trusts<sup>9</sup> so that they could be restrained temporarily from dealing with their own assets or from enforcing their rights in the State Courts. The Family Court has also asserted its jurisdiction where it has been shown that the third party has some special connection with the parties to the marriage. It has found the source of its jurisdiction to make such orders principally within the terms of s.114(3), whereby it may make interlocutory injunctions to support other orders. Since such injunctions are referable to the definition of "matrimonial cause" in s.4(1)(f), they form part of the exclusive jurisdiction of the Family Court.<sup>10</sup>

Third parties with no special connection who have dealt with the parties at arm's length in a commercial transaction have been regarded by the Court as being beyond the scope of its jurisdiction; alternatively, the Court has taken the view that it would be an improper use of its discretion to affect a party who may be termed an innocent bystander. In Rieck,<sup>11</sup> Nygh J. refused to restrain a company from proceeding in the Supreme Court in relation to a charge executed by the husband over the matrimonial home since the transaction had been concluded on a commercial basis and the company had no other connection with the parties. The Full Court recently took a similar stance in Prince,<sup>12</sup> where the property claim of the wife was stayed in order that the finance company could pursue in the Supreme Court its application in relation to an alleged contract of guarantee with the husband. The Full Court resolved that, even if it had the jurisdiction to hear the dispute as to the contract between the husband and the company, to do so would be an improper use of its discretion.<sup>13</sup> In Pockran and Crewes; Pockran,<sup>14</sup> a parent, who had secured a mortgage in relation to moneys he had lent the parties and who had obtained a Supreme Court judgment against the wife in respect of \$14 000 still owing on the mortgage, was



accorded the status of an innocent bystander since he had dealt with the parties on a commercial basis. The debt owed him by the parties was deducted from their assets before a s.79 order was formulated, therefore.<sup>15</sup>

The High Court in Re Ross-Jones and Marinovich; ex parte Green (Green)<sup>16</sup> considered the case where the wife's mother sought to bankrupt her former son-in-law in order to enforce a judgment debt she had obtained in the Supreme Court in respect of a loan of some \$300 000 and interest outstanding on it. The husband filed an application under s.79 of the Family Law Act whereby he sought orders that his former wife indemnify him against his liability to Mrs. Green on the basis that the loan moneys had been applied to the overall family situation, including the transaction of business on behalf of the wife's parents. By applying for orders to restrain her until his application under s.79 had been heard, he also sought to halt Mrs. Green's proceedings both to enforce the judgment debt and to obtain a bankruptcy notice against him for the Federal Court.

It was the husband's application for interim restraining orders which formed the subject of the High Court's decision. The application came before Ross-Jones J. in January, 1984, but counsel sought time to prepare argument on the matter of jurisdiction of the Family Court, and the hearing was postponed until a date in April, 1984. In the meantime, his Honour made interim orders restraining Mrs. Green from enforcing her Supreme Court judgment pending further order of the Court. Mrs. Green, however, applied directly for orders for prohibition and certiorari against his Honour, Ross-Jones J., even though, had he been permitted to hear the case, his decision more than likely would have been the same as that in the decisions noted above, particularly that in Pockran and Crewes; Pockran,<sup>17</sup> which also involved a judgment debt. An order nisi for prohibition was upheld by six of the members of the Full Bench,<sup>18</sup> Deane J. alone deciding that no particular harm would be committed if Ross-Jones J. were allowed to rule on the issue. In fact, his Honour was of the view that the High Court might well benefit from hearing what the Full Court of the Family Court's approach to the matter would be. He said,<sup>19</sup>

"...(A) writ of prohibition precluding the Family Court from dealing with a matter effectively deprives this Court of the benefit of the views of the Full Court of that court on the particular case. The Family Court's jurisdiction is a specialist one. The judges of that court possess specialist experience and knowledge of the content and administration of family law and the Family Court's own practice and procedures. Where questions of constitutional power are not involved, it is undesirable that a substantive question which has arisen in the Family Court should be determined in this Court without the benefit of the views of the Full Court of the Family Court on the particular case. The position is, of course, a fortiori in a case where prohibition is sought before even a primary judge has had an opportunity of dealing with the question which it is sought to raise in this Court."

As a result, he stated, the High Court had quite overlooked matters of significance "... not apparent to members of this Court whose practical experience in family law matters is, ordinarily, at best, limited".<sup>20</sup>

The majority of the Court held that the Family Court had no jurisdiction to make even interim orders against the third party, Ascot Investments<sup>21</sup> being decisive of the matter. The Family Court could not detract from the rights of Mrs. Green under the general law to enforce her judgment debt since she was not a puppet of the parties to the marriage and it was nowhere suggested that the relevant loan transactions were shams. The only extension of the jurisdiction to make interim orders, as opposed to permanent orders, against third parties which could be envisaged was for the purpose of maintaining the status quo for a limited period until the Family Court could decide whether it had jurisdiction in a matter brought before it.<sup>22</sup> Except in this respect, "... the Court has no wider jurisdiction to grant an interlocutory injunction than a permanent injunction".<sup>23</sup>

Effectively, then, the limits of all third party proceedings are to be defined by the decision in Ascot Investments.<sup>24</sup> Even as an interim measure, it will not be possible for the Family Court to prevent one spouse from exploiting his or her position as a trustee of a discretionary trust or director of a family company to which matrimonial assets have been transferred in order to diminish the other spouse's chances of obtaining a property settlement which is just in all the circumstances.

In Harris and Harris; Re Banaco Pty. Ltd.,<sup>25</sup> the Full Court made an order against a family company which was not the alter ego of a party to the marriage but was legally and factually controlled by the husband's mother. The company was taking steps to evict the wife and children from the matrimonial home, a company asset, but the wife was able to obtain from the Family Court interim orders which were ostensibly in aid of maintenance orders already made against the husband. The Full Court approved the making of interlocutory injunctions against the company until alternative accommodation was supplied for the applicant wife and the children of the marriage on the grounds that the company had a special connection with the parties.

In Green,<sup>26</sup> Gibbs CJ. and Mason J. expressly denied that a finding that there is a special connection between the parties to the marriage and a third party in any way enlarges the jurisdiction of the Family Court, but while a majority of the High Court disapproved of Harris<sup>27</sup> on the matter of its interpretation of Ascot Investments<sup>28</sup> only the two judges named above went so far as to specifically overrule the Full Court decision on the subject of the special connection.<sup>29</sup>

Kovacs<sup>30</sup> suggests that Green can be confined on the basis that, in cases such as Anderson,<sup>31</sup> af Petersens,<sup>32</sup> Gillies,<sup>33</sup> and Pockran and Crewes; Pockran,<sup>34</sup> the matter of a parental loan arose in the context of litigation between the parties concerning certain property, most commonly the matrimonial home. On the other hand, in Green, the loan to the husband by the wife's mother was the subject of the litigation between Dr. Marinovich and Mrs. Green as well as of the s.79 proceedings between the husband and the wife. That is, there was no matrimonial property dispute between

the husband and the wife other than that involving the rights of Mrs. Green. It appears, then, that it was entirely appropriate that the litigation be confined to the Supreme Court. Where the dispute involving the third party is only one facet of the wider property litigation between the spouses, on the above interpretation, Green is not applicable. Therefore, precedents established by the Full Court in such decisions as Buckeridge (No.2)<sup>35</sup> and Smith and Saywell,<sup>36</sup> where family companies were restrained by interlocutory injunctions from pursuing Supreme Court actions pending the hearing of the parties' property claims in the Family Court so as to keep the property intact, may still stand. Distinguishable also would be cases like Stowe,<sup>37</sup> where the family company was prevented from sub-dividing and selling real estate pending the hearing of s.79 proceedings in relation to all the assets of the parties.<sup>38</sup> In cases such as these, the real objective is not, as it was in Green, to ultimately extinguish the right of the third party under the general law. The importance of the injunctive jurisdiction to a party potentially at risk from the manipulation of trust and company assets was emphasised in Stowe:<sup>39</sup>

"A party to a marriage may be able to establish a legitimate claim to have assets preserved, pending a full investigation (of the financial circumstances of both parties), even if those assets or some of them are held in the name of a trust or company with which the other party is closely connected, or over which he or she has powers of management or control. This is especially important where those assets have in reality been created or acquired as a result of the efforts of one or both parties during the marriage. It may be only as a result of such investigation that it can be determined whether and to what extent a party has a relevant interest in the property in question, that is, an interest which the Court can deal with directly".

Further, since the High Court in Ascot Investments<sup>40</sup> expressly upheld the use of the Ross injunction<sup>41</sup> in relation to both temporary<sup>42</sup> and permanent orders where the only directors of the company are the parties to the marriage, and in Green<sup>43</sup> it held

that Ascot Investments stated the law regarding the extent to which orders of the Family Court may affect the interests of third parties, it seems that the Ross injunction remains a valuable weapon.

In Stowe,<sup>44</sup> Yates (No.2),<sup>45</sup> Kelly (No.2),<sup>46</sup> and Tiley,<sup>47</sup> the notion of effective control of a company or a trust was used to declare the benefits received by the party controlling the entity to be a "financial resource" of that party within s.75(2)(b) of the Act. As a result, the husband (who is generally the spouse to be in effective control of an entity) was required to transfer to the wife a larger share of his personally owned assets or was ordered to pay out "appropriately augmented"<sup>48</sup> lump sums by way of compensation when a property order was formulated. Green in no way affected the doctrine of effective control, so the Family Court still has a useful remedy to apply against respondents who attempt to shelter behind corporate structures in order to evade financial obligations to the other party to the marriage.

The majority in Ascot Investments excepted from their ruling the situation where a company could be termed a puppet or a sham of a party to the marriage.<sup>49</sup> The exception, up until the decision in Green, has not been utilised, although, in Howard,<sup>50</sup> the Full Court expressed the view that where a third party, in this case a family company, exercises its legal rights not bona fide for its own purposes but for the sole purpose of assisting the husband and disadvantaging the wife, it may well be that the Family Court has jurisdiction to intervene by granting injunctive relief.<sup>51</sup> It is submitted that in the future, where a third party is closely associated with a party to the marriage to the extent outlined in Howard,<sup>52</sup> the injunctive powers under s.114(3) could be employed in order to extend the Family Court's jurisdiction in relation to both interim and permanent orders.<sup>53</sup> Moreover, where the dispute involving a third party is only part of a wider property litigation between the parties to the marriage and both disputes can be seen to be inextricably linked, the Family Court has a discretion to assume an accrued jurisdiction to solve both the non-federal and the federal aspects of the proceedings.<sup>54</sup>

The decision in Heath and Heath; Westpac Banking Corporation

(No.2)<sup>55</sup> to set aside a mortgage by using the provisions of s.85 even though it meant postponing the bank's interests to those of the wife indicates that the Family Court is prepared to use that section to its ultimate extent in order to prevent or set aside any disposition or transaction of property to a third party which is likely to defeat a property order made by the Court.

Potentially, s.85A confers wide powers, for it clearly envisages that, in appropriate circumstances, third parties (for example, trustees) will be made the direct subject of orders of the Family Court. The section will enable the Court to make orders directly in relation to property which has been transferred into an ante- or post-nuptial settlement made in relation to the marriage.<sup>56</sup>

It can be seen from the foregoing that, within certain parameters, particularly those imposed by the interests of third parties, the Family Court can provide a remedy where a party to the marriage manipulates the assets of the matrimonial partnership in a manner detrimental to the interests of the other spouse. Where there is a conflict between the interests of the applicant under the Family Law Act and the interests of the third party under the general law of partnership, bankruptcy, discretionary trusts and trading companies, the interests of the applicant usually, but not always, have to give way.

## CHAPTER SEVEN

## CONCLUSION

Within the boundaries set by constitutional restraints<sup>1</sup> and the inability of the Family Court to make orders binding third parties<sup>2</sup> or directly affecting their rights save within a narrow range of exceptions,<sup>3</sup> the Family Law Act 1975 (Cth.) provides the means by which financial misconduct can be remedied.

The constitutional restraints on the Commonwealth Parliament's powers to legislate with respect to "marriage" and "matrimonial causes" and the limits that the High Court has placed on these powers<sup>4</sup> are necessary if third parties' interests are to be sufficiently protected<sup>5</sup> that they are not deterred from entering into contracts or other business dealings with a husband or wife because of the risk that the assets of that person could be substantially reduced by an order of a court acting upon the broad basis of judicial discretion rather than upon the ordinary principles relating to commercial transactions.<sup>6</sup> That any extension of the Commonwealth's control over the rights, duties and obligations arising from marriage should be approached with care because of its possible impact upon the operation of laws made and administered by the States has been recognised by both the Senate Joint Select Committee<sup>7</sup> and the Australian Law Reform Commission.<sup>8</sup> On the other hand, Kirby J., in an address to the Family Law Section of the Victorian Law Institute, remarked on the failure on the part of legislators, Federal and State, and legal policy makers to understand the close inter-relationship of family law with other areas of the law.<sup>9</sup>

Obviously, since "... marriage is an economic as well as a social institution",<sup>10</sup> there will be instances where there is a conflict between the interests of the spouses inter se and the interests that arise in normal commercial dealings. Except where a transaction giving rise to the purported rights of a third party is a "sham" or "device",<sup>11</sup> a third party is acting in collusion with a party to the marriage,<sup>12</sup> or the third party is a company or trust which is no more than the alter ego of one of the parties to the marriage,<sup>13</sup> or where the dispute involving a third

party is founded on a common nucleus of facts so that the Family Court, if it exercises its discretion to do so, may assume an accrued jurisdiction<sup>14</sup> to decide both the federal and the non-federal aspects of the case before it, there is no jurisdiction in the Family Court to make orders encroaching upon a third party's rights, whether those rights arise under the law relating to contracts, trusts, property, companies, partnerships or insolvency. Those trust or company entities which have been established as a tax shelter<sup>15</sup> are usually invulnerable to an order of the Family Court unless it can be shown within the provisions of s.85(1) that the actual reason for their establishment was to defeat an existing or anticipated order of the Court.

The expansion of the Family Court's jurisdiction by the insertion of paragraph (ca)(i) in the definition of "matrimonial cause" in s.4(1)<sup>16</sup> has provided married persons with a means of settling most property disputes between them before the Family Court providing that proceedings can be said to arise out of the marital relationship. Previously, parties had to resort to the State Supreme Courts while the marriage subsisted or they had to wait until the expiration of a twelve-month separation period so that principal proceedings could be instituted and ancillary proceedings relating to property could be heard. Neither course was satisfactory. Except in Victoria and Western Australia, the relief dispensed by State Courts in property matters which fall within their jurisdiction is circumscribed by the strict rules of law and equity and there are no powers to adjust property interests according to domestic or other indirect non-financial contribution or future need. On the other hand, if a spouse preferred the dispute to be heard in the Family Court because of the advantages offered by its discretionary jurisdiction, equitable interests were vulnerable during the separation period, the other spouse having up to twelve months to arrange his or her property affairs in order to reap the maximum benefit from them. This would be to the detriment of the applicant spouse unless an injunction under s.114(1) or s.114(3) to protect the property could be obtained in the interim.

Notwithstanding the Family Court's power to grant an injunction in aid of its jurisdiction to restrain dealings in property (s.114(3))



or to set aside or restrain a disposition which is likely to defeat an existing or anticipated order of the court (s.85), its powers to make orders or injunctions affecting property independently of any other relief under the Act arise only in proceedings between parties to the marriage "in circumstances arising out of the marital relationship". The scope of this independent jurisdiction has still to be determined.<sup>17</sup>

Where it has the jurisdiction and the power to do so, the Family Court has the discretion to vary existing legal and equitable interests and make orders which do justice according to the circumstances of the case before it. If the property in dispute has been dissipated or alienated, the Court may order restitution, resort to other property of the respondent in order to meet the order which it wishes to make, make an order against his or her financial resources, or order the respondent to exercise his or her fiduciary powers in a particular manner. A respondent who has impaired the applicant's future earning capacity may be ordered to pay either lump sum or periodical maintenance or to transfer property to the applicant as a means of compensation, and an applicant who has been disadvantaged by unnecessary legal or other costs by the actions or obduracy of the respondent or who has had to meet all outgoings on matrimonial property and maintain the children of the marriage during the period after separation will also be reimbursed, either directly through an order for payment of a monetary sum or through an appropriate property order.

That financial misconduct should be remedied is consonant with the policy behind Part VIII of the Family Law Act, for this part concentrates on the economic realities of each situation. Section 79, the principal property section, which by s.79(4)(e) incorporates the guidelines set down in s.75(2), directs the Court's attention to such matters as the applicant's property-related contributions and future needs and the respondent's ability to satisfy a proposed order. Therefore, conduct which carries with it economic consequences is intimately bound up with the deliberations of the Family Court which, working within the boundaries set by Part VIII, except in the situations where commercial expediency demands otherwise, can usually provide redress for an applicant whose financial situation has been affected

by such conduct. However, as it stands at present, Australian matrimonial property law fails to protect as of right<sup>18</sup> a non-owner spouse against the owner spouse who sells or encumbers property such as the matrimonial home which is vital to the marital relationship without the other's consent or who mismanages property by neglecting or dissipating it or irresponsibly burdening it with debt. Only by applying to the Family Court can a spouse obtain an order or injunction to protect his or her inchoate interests. It is imperative that legislation be enacted to ensure that control over dealings with certain assets is shared by spouses.

## NOTES AND REFERENCES

### CHAPTER ONE

1. Considerations of space do not permit more than a brief mention of cases decided in other jurisdictions.
2. Wirth v. Wirth (1956) 98 C.L.R. 228 (High Court of Australia).
3. Pettitt v. Pettitt (1970) A.C. 777, 794, per Lord Reid.
4. Strictly speaking, reference should be made to "Family Courts" since, in accordance with the provisions of S.41 of the Family Law Act, a separate court system was established in Western Australia by the Family Court Act 1975 (W.A.). However, for reasons of convenience, "Family Court" will be used throughout.
5. See Chapter Four, Part A, of this study.
6. The constitutionality of the provision, paragraph (ca)(i) of the definition of "matrimonial cause" in s.4(1) of the Family Law Act, has still to be considered by the High Court.
7. (1976) 50 A.L.J.R. 594.
8. Note that s.161 has a fairly limited operation. See Chapter Three, Part A(d), of this study.
9. See Chapter Two, Part C, of this study.

### CHAPTER TWO

1. Neumayer The Reform of Family Law in Europe (ed. Chloros, 1978), 1 at 10. He lists Italy, Greece, Scotland, Turkey, Austria, the Republic of Ireland, England and certain regions of Spain.
2. It should be noted that others were passed in 1870, 1874 and 1893.
3. Hardingham and Neave Australian Family Property Law (1984), 20.

#### PART A:

4. Ibid., Chapter One, for a very full discussion of the common law position. For a summary of matrimonial property law in England from the time of the Norman Conquest, see Johnston (1972) 47 N.Y.U.L.R. 1033, 1044 to 1057.
5. Johnston, ibid., 1046.
6. (1834) 3 My. & K. 209, 220; 40 E.R. 80, 84.
7. Connell (1981) 50 Fordham L.R. 415, 418 to 419.
8. Karowe (1974) 39 Albany L.R. 52, 53.
9. Connell (1981) 50 Fordham L.R. 418, 419.
10. Wilson v. Ford (1868) L.R. 3 Exch. 63. She also had authority in equity to borrow money within the same limits: Deare v. Souten (1869) L.R. 9 Eq. 151, as explained by Denning, L.J., in Biberfeld v. Behrens (1952) 2 Q.B. 770, 783.
11. See Hardingham (1980) 54 A.L.J. 1.
12. Glendon (1974) 49 Tulane L.R. 21, 26 to 27, passim.
13. For methods of creating a separate use, see Hardingham and Neave Australian Family Property Law (1984), 11, and authorities there cited.

14. Bennett v. Davis (1725) 2 P. Wms. 316; 24 E.R. 746; Parker v. Brooke (1804) 9 Ves. 583; 32 E.R. 729.
15. Fettiplace v. Gorges (1789) 1 Ves. 46; 30 E.R. 223; Nicholson v. Australian Joint Stock Bank (1872) 10 S.C.R. (N.S.W.) L. 327; In Will of Tregurtha (1884) 10 V.L.R. (I.P.M.) 89; Willcock v. Noble (1875) L.R. 7. H.L. 580.
16. Sturgis v. Corp (1806) 13 Ves. 190; 33 E.R. 266; Bartley v. Bosworth (1870) 5 S.A.L.R. 27.
17. Taylor v. Meads (1865) 4 De G.J. & S. 597, 604; 146 E.R. 471, 476, per Lord Westbury.
18. Gore v. Knight (1705) 2 Vern. 535; 23 E.R. 946.
19. Brooke v. Brooke (1858) 27 L.J. Ch. 639.
20. Barrack v. M'Culloch (1856) 3 K. & J. 110; 69 E.R. 1043.
21. On the unsatisfactory results of this rule, see Hoddinott v. Hodinnott (1949) 2. K.B. 406 (Bucknell L.J. and Cohen L.J.; Denning L.J. dissenting).
22. In Pybus v. Smith (1791) 3 Bro. C.C. 340; 29 E.R. 570.
23. Brandon v. Robinson (1840) 4 My. & Cr. 390, 393 to 394; 41 E.R. 152, 153.
24. Bowen v. McCormack (1895) 12 W.N. (N.S.W.) 59.
25. Hardingham and Neave Australian Family Property Law (1984), 13.
26. The English Census of 1861 estimated that 24% of married women were in employment: Settling Up (Ed. McDonald, 1986), 4. For an analysis of changes in employment of women brought about by industrialization, see, for example, Trevelyan English Social History (3rd. ed., 1946), 486 to 487.
27. McDowell (1965) 45 Boston Uni. L.R. 43, passim.
28. Ibid.
29. Hardingham and Neave Australian Family Property Law (1984), 20.
30. (1974) 49 Tulane L.R. 21, 27.

#### PART B:

31. Hardingham and Neave Australian Family Property Law (1984), 20, citing Dicey Law and Public Opinion in England (2nd. ed. 1962), 383.
32. On Liberty and Other Essays, cited by Johnson (1972) 47 N.Y.U.L.R. 1022, 1033.
33. Karowe (1974) 39 Albany L.R. 52, 54 to 55, citing Voices from Women's Liberation (ed. L. Tanner, 1970), 21 to 22, as authority.
34. Enacted by the English Parliament in 1870, 1874, 1882 and 1893.
35. Hardingham and Neave Australian Family Property Law (1984), 20 to 21.
36. Ibid., 20.
37. See respectively Gray Reallocation of Property on Divorce (1977), 88; Karowe (1974) 39 Albany L.R. 52, 54 to 55; and Brown (1971) 4 Ottawa L.R. 331, 333. For the reception accorded the legislation by the American Courts, see Chuseo (1985) 29 Am. J.L. Hist. 3.
38. Hardingham and Neave Australian Family Property Law (1984), 21.
39. See Cretney Principles of Family Law (4th ed. 1984), 632, passim.

40. Stone Family Law (1977), 87. Temkin acknowledges the truth of this only where a spouse's ownership of property is unequivocal: (1981) I.C.L.Q. 190, 191.
41. Cretney Principles of Family Law (4th ed., 1984), 632, citing John Stuart Mill "The Subjection of Women", 263.
42. For example see Report of the Royal Commission on Marriage and Divorce 1956 (England) - the Morton Commission - Cmd. 9678; Brown (1971) 4 Ottawa L.R. 331, 337; Comment (1971) 121 N.L.J. 983; Family Law: First Report on Family Law - A New Approach 1973 (Law Comm., Eng. No. 52); Quijano (1975) 13 Osgoode Hall L.J. 381, 387; Kovacs (1980) 6 Uni. Tas. L.R. 227; Women's Electoral Lobby Discussion Paper on Reform of Marital Property Law (1981); Scutt and Graham For Richer, For Poorer (1984).
43. Freed and Foster (1973) 7 Fam. Law Q. 275, 277; Weyrauch (1980) 13 Fam. Law Q. 415, 419; Foster 18 S.D.L.R. 572, 591; Bryneston (1980) 45 Albany L.R. 483, 488. Lord Simon of Glaisdale has frequently expressed views on this matter: Gray Reallocation of Property on Divorce (1977), 34, canvasses these.
44. For example see Report of the Royal Commission on Marriage and Divorce (1956), para. 644; Report of the Joint Select Committee on the Family Law Act (1980) Vol. 1. para. 5.150.
45. Brown (1971) 4 Ottawa L.R. 331, 337.
46. Quijano (1973) 13 Osgoode Hall L.J. 381, 387. For a contrasting view, see Glendon State, Law and Family (1977), Chapter 4. She believes that the separate property system has the ideological advantage of guaranteeing the independence of spouses.
47. The position is different under community property regimes. There is regulation of obvious wasting of property through profligate and extravagant living; sales of property to friends and relatives for inadequate consideration cannot be effected without answerability and secret trusts may be disallowed. (Kovacs (1980) 6 Uni. Tas. L.R. 227, 253). Of course, legislative restraints have been introduced in jurisdictions with separate property regimes. For example, in Australia, s.85 of the Family Law Act 1975 empowers the court to set aside or vary transactions designed to defeat claims for property adjustment. There is, however, no wide-ranging power to protect assets generally. See further Chapter Five.
48. (1965) A.C. 1175.
49. Kovacs (1980) 6 Uni Tas L.R. 227, 253 fn. 98.
50. Family Provision Act 1982 (N.S.W.); Inheritance (Family Provision) Act 1972 - 1975 (S.A.); Administration and Probate Act 1958 (Vic.); Succession Act 1981 (Qld.); Inheritance (Family and Dependents Provision) Act 1972 (W.A.); Testator's Family Maintenance Act 1912 (Tas.).
51. Except in New South Wales, where sections 21 to 29 of the Family Provision Act 1982 empower the Supreme Court of New South Wales to deal with certain "prescribed transactions".
52. Kovacs (1980) 6 Uni. Tas L.R. 227, 254.
53. Kovacs, ibid., 253; Bailey (1980) 54 A.L.J. 190, 190.
54. Kovacs, ibid.; see also Friedmann (ed.) Matrimonial Property Law (1955), 433 to 434; Temkin (1981) 30 I.C.L.Q. 190, 191 and authorities there cited. Note that the Law Council of Australia has put forward a proposal for a National Family Legal Expenses Insurance Fund: see (1985) 7 Law Soc. Bull. 44.

PART C:

55. For Aristotle's view of epikeia, see Lloyd Introduction to Jurisprudence (4th ed., 1979), 963.
56. The most frequently cited account of the doctrine of equity is that of Plowden in Eyston v. Studd (1574) 2 Plowden 459; E.R. 688.
57. Cochrane v. Moore (1890) 25 Q.B. 57; Re Cole, A Bankrupt (1963) 3 All E. R. 433. The apparent harshness of the Court of Appeal's decision in the latter case may be explained by the need to protect the husband's creditors.
58. See Woolley (No.2) (1981) F.L.C. 91-011 at 76 137 per Nygh J.
59. Tory v. Tory (1953) Law Journal 103, 351; Rondeau v. Marks (1918) 1 K.B. 75.
60. Errington v. Errington (1952) 1 K.B. 290; Ogilvie v. Ryan (1976) 2 N.S.W.L.R. 504; Horrocks v. Forray (1976) 1 W.L.R. 230. See Hardingham and Neave Australian Family Property Law (1984), Chapter Five.
61. Thomas v. Thomas (1956) N.Z.L.R. 785; Raffaele v. Raffaele (1962) W.A.R. 29; Inwards v. Baker (1965) 2 Q.B. 29; Olsson v. Dyson (1969) 120 C.L.R. 365; Pascoe v. Turner (1979) 2 All E.R. 945. See Neave and Weinberg (1978) 6 Uni. Tas L.R. 24, 27 to 32.
62. Allen v. Snyder (1977) 2 N.S.W.L.R. 685; Hohol v. Hohol (1980) F.L.C. 90-824; Gissing v. Gissing (1971) A.C. 886, particularly Lord Diplock's judgement. Academic comment is plentiful, but see particularly Hardingham and Neave Australian Family Property Law (1984), Chapter Six.
63. Waters The Law of Trusts in Canada (1974), 229. See also Holdsworth A History of English Law (1937), (iv) and 424.
64. Milroy v. Lord (1862) 4 De G.F. & J. 264; 45 E.R. 1185.
65. See Leibrandt v. Leibrandt (1976) F.L.C. 90-058 at 75 246 to 75 254 for a comprehensive survey of the case law (Woodward J.). The presumption of advancement was also considered by the High Court in Calverley v. Green (1984) F.L.C. 91-565.
66. In re Kerrigan; ex parte Jones (1956) 47 S.R. (N.S.W.) 76 at 78 per Jordan C.J.
67. (1956) 95 C.L.R. 353, 365.
68. Leibrandt v. Leibrandt (1976) F.L.C. 90-058 at 75 264.
69. Re joint bank accounts, see Heseltine v. Heseltine (1971) 1 W.L.R. 342.
70. Re Vindograff (1935) W.N. 68.
71. Joaquin v. Hall (1976) V.R. 788 (expressly refusing to follow Seldon v. Davidson (1968) 1 W.L.R. 1083, where it was held that a loan should be presumed).
72. (1970) A.C. 777 at 793, 802, 811 and 823 to 824.
73. (1970) 1 All E.R. 540.
74. (1972) Current Legal Problems 84, 96.
75. The presumption has been statutorily abolished in Ontario: s.11 Family Law Reform Act 1978 (Ont.)
76. See Wirth v. Wirth (1956) 98 C.L.R. 228; Hepworth v. Hepworth (1959) 110 C.L.R. 306 and Glynn v. Commissioner of Stamp Duties (1977) 2 N.S.W.L.R. 673.
77. (1981) F.L.C. 91-011.
78. (1984) F.L.C. 91-565. See also Muschinski v. Dodds (1985) D.F.C. 95-020 (High Court).
79. Contra Mason, Brennan and Deane JJ.

80. Calverley v. Green (1984) F.L.C. 91-565 per Gibbs CJ., Mason, Brennan and Dean JJ.
81. Pettitt v. Pettitt (1970) A.C. 777 at 815, per Lord Upjohn.
82. (1984) F.L.C. 91-565, relying on Napier v. Public Trustee (W.A.) (1981) 55 A.L.J.R. 1 at 2 per Gibbs CJ.; Pettitt v. Pettitt, ibid., 813 to 814.
83. Calverley v. Green, ibid., at 79 570.
84. Fry v. Lane (1888) 40 Ch. D. 312, 322; Blomley v. Ryan (1956) 99 C.L.R. 362 at 405, 415. Curiously, a husband is not presumed to exert undue influence on his wife; it has to be affirmatively proven: Dupont (1980) F.L.C. 90-881; O'Brien (1981) F.L.C. 91-094.
85. See, e.g., McCormick v. Grogan (1869) L.R. 4 H.L. 82, 97. (Lord Westbury).
86. Spry Equitable Remedies (2nd. ed., 1980), 236.
87. Heydon, Gummow and Austin Cases and Materials on Equity (2nd. ed., 1982), 298.
88. s. 52 and s. 53 Law of Property Act 1925 (Eng.) For the legislation of the Australian States, see Hardingham and Neave Australian Family Property Law (1984), 64 to 68. In the case of Torrens Land, a registered instrument is treated as if it were a deed.
89. Rochefoucauld v. Boustead (1897) 1 Ch. 196; Bannister v. Bannister (1948) 2 All E.R. 133 (C.A.); Last v. Rosenfeld (1972) 2 N.S.W.L.R. 923.
90. Maddison v. Alderson (1883) 8 App. Cas. 467, 475
91. Ibid., 479
92. See McBride v. Sandiland (1918) 25 C.L.R. 69; Regent v. Millett (1976) 50 A.L.J.R. 799 and Ogilvie v. Ryan (1976) 2 N.S.W.L.R. 504.
93. For example, see Steadman v. Steadman (1974) 2 All E.R. 977 and Re Gonin (1977) 1 W.L.R. 379.
94. (1970) A.C. 777, 810.
95. Allen v. Snyder (1977) 2 N.S.W.L.R. 685 at 705 per Mahoney JA.
96. McFarlan in Recent Developments in Equity and the Law of Torts and Contract (Committee for Post-Graduate Studies in the Department of Law, Sydney, 1979) 151, 157.
97. See, particularly, Chapter Five of this study.
98. See Chapter Four.
99. What constitutes "contribution", both direct and indirect, is analysed in Chapter Five.
1. For example, see Rimmer v. Rimmer (1953) 1 Q.B. 63; Fribance v. Fribance (1957) 1 All E.R. 357.
2. See Miller (1970) 86 L.Q.R. 98.
3. The doctrine of "family assets" was never accepted in Australia (see Wirth v. Wirth (1956) 98 C.L.R. 228 ; Hepworth v. Hepworth (1959) 110 C.L.R. 306) nor in Canada (see Thompson v. Thompson (1961) S.C.R. 3, 13 to 14; Rathwell v. Rathwell (1978) 83 D.L.R. (3d.) 289, 306, per Dickson J.).
4. (1970) A.C. 777.
5. (1971) A.C. 886.
6. Dewar (1982) 60 Canadian B.R. 265, 292.
7. The phrase is used by Lord Denning, M.R., and Edmund Davies L.J. (dissenting) in the Court of Appeal decision in Gissing v. Gissing (1969) 2 Ch. 85 at 93 and 94 respectively.
8. Gissing v. Gissing (1971) A.C. 886, 901.
9. Ibid. at 905

10. See Dewar (1982) 60 Canadian B.R. 265, 294 and authorities there cited.
11. (1972) 1 All E.R. 943.
12. (1975) 1 W.L.R. 1519.
13. Ibid. at 1525.
14. (1977) 2 N.S.W.L.R. 685.
15. (1971) A.C. 886.
16. Dewar (1982) 60 Canadian B.R. 265, 295 and authorities there cited.
17. See, for example, Falconer v. Falconer (1970) 3 All E.R. 499; Cooke v. Head (1972) 2 All E.R. 38; Heseltine v. Heseltine (1971) 1 All E.R. 952. In this context, see the comments of Laskin J. (dissenting) in Murdoch v. Murdoch (1975) 1 S.C.R. 423, 439.
18. As it was described by Samuels J.A. in Allen v. Snyder (1977) 2 N.S.W.L.R. 685, 698.
19. Ibid. It had, however received recognition by Mahoney J., as he then was, in Doochan v. Nelson (1973) 2 N.S.W.L.R. 320 and, to a lesser extent, in the decision of Holland, J. in Ogilvie v. Ryan (1976) 2 N.S.W.L.R. 504. It is interesting to note that Edmund Davies L.J. remarked in Carl-Zeiss-Stiftung v. Herbert Smith and Co. (No. 2) (1969) 2 All E.R. 367, 381 that English law provides no clear and all-embracing definition of a constructive trust but the tenets of it were laid down by the N.S.W. Court of Appeal in Allen v. Snyder.
20. (1959) 110 C.L.R. 309. Note that although Samuels J.A. adopted this reasoning, Mahoney J.A. took the contrary view. For academic comment regarding the use of the trust as a remedial device, see, for example, Wade (1979) 6 Uni. Tas L.R. 97, 106; Helsham J. (1979) 8 Syd. L.R. 571, 576; New South Wales Law Reform Commission Report on De Facto Relationships (1983), paras. 7.29 to 7.35, 7.42 to 7.60; Gummow (1978) 94 L.Q.R. 351; Neave (1978) 11 M.U.L.R. 343; Davies (1980) 7 Adelaide L.R. 200; Oakley (1973) Current Legal Problems 17; Dewar (1982) 60 Canadian B.R. 265; Evans (1984) 22 Law Soc. J. 338 and 469; Hardingham and Neave Australian Family Property Law (1984), 100 to 134, passim.
21. This principle was recently re-stated by the whole Court in Baumgartner v. Baumgartner (1985) D.F.C. 95-014 (N.S.W. Court of Appeal), although Mahoney J.A. dissented from the ultimate decision made. In Muschinski v. Dodds (1985) D.F.C. 95-020 (High Court), Deane and Mason J.J. also stated that equity will not permit the other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable to do so.
22. (1971) A.C. 886, 905; Re Densham (1975) 1 W.L.R. 1519 (analysed by Webb (1976) L.Q.R. 489, 492); Ogilvie v. Ryan (1976) 2 N.S.W.L.R. 504, 517 to 518.
23. (1980) F.L.C. 90-824 at 75 208. See also Kardynal v. Dodek (1980) F.L.C. 90-823 at 75 202.
24. Australian Family Property Law (1984), 128.
25. Ibid. at 128; for example, compare Murray v. Heggs (1980) 6 Fam. L.R. 781 with Bocalatte v. Bushelle (1980) Qd. R. 180.
26. Australian Family Property Law (1984), 129.
27. As in Pascoe v. Turner (1979) 2 All E.R. 945, where a woman spent 230 pounds on improvement to a house on the strength of her lover's statement that the house and its contents were hers. The New South Wales Law Reform Commission, however, is



of the opinion that the principle of proprietary estoppel may have limited value for de facto partners who have expended money on, or improved the property at the request of, or with the acquiescence of, the other de facto spouse. Because de facto partners seldom define their expectations with clarity, and because contributions sometimes take the form of assistance with general expenses of the household rather than monetary contributions, proprietary estoppel will generally be of limited benefit as the basis for establishing claims of an interest in the property itself: Report No. 36, Report on De Facto Relationships (1983), 140.

28. See Kitto J.'s judgment in Olsson v. Dyson (1968) 120 C.L.R. 365, at 376, 378. In the Court of Appeal's decision in Pascoe v. Turner, (*ibid.*), the woman gained the legal fee simple in the house because she had acted to her detriment in faith of the promise.
29. See Rathwell v. Rathwell (1978) 83 D.L.R. (3d.) 289 and Pettkus v. Becker (1980) 117 D.L.R. (3d.) 257. In Muschinski v. Dodds (1985) D.F.C. 95-020, Deane J. indicated that the concept of unjust enrichment has not yet been accepted by Australian Law. It has been accepted in N.Z.: Hayward v. Giordani (1983) N.Z.L.R. 140, 148.
30. (1982) 1 N.S.W.L.R. 61.
31. (1977) 2 N.S.W.L.R. 685.
32. (1984) 2 Law Soc. J. 338 at 346.
33. (1985) D.F.C. 95-014 (N.S.W. Court of Appeal).
34. (1977) 2 N.S.W.L.R. 685.
35. (1984) F.L.C. 91-565 at 79 570.
36. Recommendation of the New South Wales Law Reform Commission in Report on De Facto Relationships (1983), para. 7.44, page 147. In his judgment, Mahoney JA. pointed out that the adjustive jurisdiction is only available to the court at the termination of the relationship: Baumgartner (1985) D.F.C. 95-014 at 75 201 (Mahoney JA.'s emphasis).
37. Kirby P. gives as examples Feeney v. Feeney (unrepd. 3 May 1979); Muschinski v. Dodds, unrepd., 1 July 1981 (affirmed Court of Appeal, unrepd., 30 July 1982). However, the latter case was subject to appeal to the High Court: see below.
38. (1977) 2 N.S.W.L.R. 685.
39. Kirby P. was quoting Powell J. in Feeney v. Feeney, unrepd., 3 May 1979.
40. (1985) D.F.C. 95-020.
41. (1985) D.F.C. 95-014.
42. (1985) D.F.C. 95-020 at 75 260.
43. (1970) A.C. 777.
44. (1971) A.C. 886.
45. (1977) 2 N.S.W.L.R. 685.

### CHAPTER THREE

#### PART A:

1. (1956) 98 C.L.R. 228.
2. Ibid., 231, per Dixon FJ. See also Hepworth v. Hepworth (1963) 110 C.L.R. 309, especially at 317 per Windeyer J. Note that the High Court's decision is Muschinski v. Dodds (1985)

- D.F.C. 95-020 shows that judicial discretion is not to be used as a means of settling property disputes. (Discussed in Part C of Chapter Two).
3. This term, which was invoked with approval by Edmund Davies LJ. and Phillimore LJ. in Gissing (1969) 1 All E.R. 1043 (C.A.) at 1047, 1055, was coined by Bucknill LJ. in Newgrosh v. Newgrosh (1950) 210 L.I.J. 108.
  4. Hine v. Hine (1962) 3 All E.R. 345, 347.
  5. (1970) A.C. 777.
  6. (1971) A.C. 886. Note the earlier decisions in National Provincial Bank v. Ainsworth (1965) A.C. 1175 and Bedson v. Bedson (1965) 2 Q.B. 666 (C.A.). A degree of judicial discretion exists even when existing property rights are determined: Lindgren (1974) 8 Uni. Qd. L.J. 103, 107 to 127; Wade (1977) 5 Uni. Tas. L.R. 248, 252.
  7. See Leibrandt v. Leibrandt (1976) F.L.C. 90-058 for a close discussion of the ordinary legal and equitable principles which affect the property rights of husbands and wives to matrimonial property. For recent decisions, see Calverley v. Green (1984) F.L.C. 91-565 and Muschinski v. Dodds (1985) D.F.C. 95-020, both High Court decisions.
  8. Hofman v. Hofman (1965) N.Z.L.R. 795, 800 per Woodhouse J.
  9. Dyer v. Dyer (1788) 2. Cox Eq. 92; 30 E.R. 42; Pettitt v. Pettitt (1970) A.C. 777, 814, per Lord Upjohn.
  10. Gissing v. Gissing (1971) A.C. 886, 909, per Lord Diplock.
  11. For example, see Robinson v. Robinson (1961) W.A.R. 56.
  12. Lord Denning's development of the "family assets" doctrine and the "deserted wife's equity", which was applied in a long line of cases from Bendall v. McWhirter (1952) 2 Q.B. 466 until it was disapproved in National Provincial Bank v. Ainsworth (1965) A.C. 1175, amply illustrate this point.
  13. Pettitt v. Pettitt (1970) A.C. 777, 794, per Lord Reid.
  14. Ibid., 797. See also 803, 805, 811, 817; Gissing v. Gissing (1971) A.C. 886, 901. Despite Kirby P.'s views about the unfairness of the application of the principle in Allen v. Snyder (1977) 2. N.S.W.L.R. 685 in Baumgartner v. Baumgartner (1985) D.F.C. 95-014, his Honour was constrained by matters of precedent to follow the decision. For Kirby P., however, "the armoury of the courts has ... been circumscribed, with the consequences of artificiality and occasional injustice because the law has failed to keep pace with changing community attitudes and changing social practices": ibid. at 75 187.
  15. Kahn-Freund (1970) 33 M.L.R. 601, 609. E.g. Married Women's Property Act 1964 (Eng.), s.1; Law of Property Act 1936-1980 (S.A.) s.105a (both concerning savings from housekeeping: analysed by Hardingham and Neave Australian Family Property Law (1984), 160 to 165) and the Matrimonial Homes Act 1967 (Eng.) (regarding the registration of a wife's "equity of occupation": see Cretney Principles of Family Law (3rd ed., 1979), 167 to 173; Bromley Family Law, 477 to 487). See generally, Freeman (1972) C.L.P. 82, 91; Brown (1971) 4 Ottawa L.R. 331, 343; Temkin (1981) I.C.L.Q. 190, 203. The Matrimonial Homes Act is soundly criticised in Wroth v. Taylor (1973) 1 All E.R. 897.
  16. For a socio-legal assessment, see Ziegert (1984) 9 L.S.B. 257.
  17. Macqueen's Law of Husband and Wife (5th. ed. 1885) would not have been very much out of date in 1950.

18. Weyrauch and Katz in American Family Law in Transition (1983) emphasise the range of difficulties that face those who are trying to understand the interaction of law and the family or law and social institutions even now.
19. Brown (1971) 4 Ottawa L.R. 331. Administrative law had a similar wait.
20. Brown, ibid, passim.
21. By the Law Commissions Act 1965 (Eng.).
22. Brown (1971) 4 Ottawa L.R. 331, 352.
23. Ibid., 332.
24. (1959) 22 M.L.R. 241, 248
25. Todd and Jones (Office of Population, Census and Survey, Social Services Division) Matrimonial Property (1972) and Baker, Bekelaar, Gibson and Raikes The Matrimonial Jurisdiction of Registrars (1977).
26. For example, see Report No. 86 Third Report on Family Law: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978).
27. Sackville in Social Security and Family Law (ed. Samuels, 1979), 83, 84. Attitudes have changed. "(T)he development of effective policies affecting families will always require an adequate understanding of their social and economic problems based on sound research". (Report of the Director of the Institute of Family Studies, Newsletter No. 12, April 1985, 1.)
28. Reference from the Attorney-General, 18th June 1983.
29. See A.L.R.C. Annual Report (1984), para. 112 to 115.
30. 30% of divorcing couples make their own property arrangements and only 4.7% of the 39 000 divorcing couples in 1982 took their property dispute to a judge for decision: Prof. Hamblly in The Age, 4th May 1984, 13. For full details see A Survey of Family Court Property Cases in Australia, A.L.R.C. Research Paper No. 1, Sydney, 1985.
31. See Settling Up (ed. McDonald, 1986) for details of the findings of this survey. The findings are summarised in McDonald The Economic Consequences of Marriage Breakdown (August, 1985)
32. Making the filling-in of the questionnaires voluntary overcame the objections of Family Court judges regarding such factors as the invasion of privacy and the irrelevance of some questions to the relief sought.
33. Family Law Council Annual Report 1983-4, 50 to 51.
34. 1951-55, Cmd. 9678, para. 644.
35. This attitude to marriage appears to be generally accepted, although Sinclair (1983) 32 I.C.L.Q. says acceptance may be transient.
36. Women in the paid workforce
 

1966	29% of married women.
1980	42.8%
1983	45%

(Scutt and Graham For Richer, for Poorer (1984), 63.)

1985	46%
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(Australian Bureau of Statistics figures for February 1985).
37. Scutt and Graham For Richer, for Poorer (1984), 23, passim. dispute the notion of economic equality between men and women, however. Women earn 67c. for every dollar earned by men. Women go in and out of the paid workforce earning less overtime. They have fewer opportunities for promotion for

- they fit their jobs around child care responsibilities, while those who work in part-time or casual jobs do not qualify for holiday pay, superannuation, sick-leave entitlements or long-service pay. For the American perspective on equal pay, see Vladeck (1984) 52 Fordham L.R. 1110.
38. Brown (1971) 4 Ottawa L.R. 331, 337 to 338, *passim*. The Australian Bureau of Statistics has concluded that if broad geographical groupings are any guide, the more affluent families are more likely to have a working wife. (The Bulletin, June 11th, 1985, 60.) Moreover, the participation rate in the workforce of women who have completed high school and have no further qualification is only 38%. For women with degrees, the rate is 76.5%. (*Ibid.*) It is fair to assume that a significant number of families are likely to be accumulating significant assets, therefore. (Figures as at February 1985).
  39. Mallett v. Mallett (1984) F.L.C. 91-507 at 79 129 *per* Deane J.
  40. Matrimonial Property Law (ed. Friedmann, 1955), 433 to 434.
  41. Or at the very least the right to contract out of a system of community of property.
  42. Silver v. Silver (1958) 1 All E.R. 523, 525 (C.A.) *per* Lord Evershed.
  43. See (1972) A.L.J. 443 for results of Todd and Jones' survey to ascertain how married persons manage their property affairs. See also Seago and Bissett-Johnson Cases and Materials on Family Law (1976), 221 and Kovacs (1980) 6 Uni. Tas. L.R. 227 at 235, 237.
  44. Mallett v. Mallett (1984) F.L.C. 91-507 at 79 129 *per* Deane J. For a cogent description of the marriage "partnership", see the judgment of Woodhouse J. in Hofman v. Hofman (1965) N.Z.L.R. 795.
  45. Hardingham and Neave Australian Family Property Law (1984), 42 to 43.
  46. The House of Lords decisions in Pettitt v. Pettitt (1970) A.C. 777 and Gissing v. Gissing (1971) A.C. 886 amply illustrate this point. Miller (1970) 86 L.Q.R. 98, 109, analyses the attitudes of the House of Lords in Pettitt.
  47. (1932) 32 Columbia L.R. 1281 at 1306 to 1307.
  48. Gray Reallocation of Property on Divorce (1977), 24. See also Sir Jocelyn Simon "With All My Worldly Goods...." (Address to the Holdsworth Club, Uni. of Birmingham, 20th March 1964, reproduced in (1965) Law Society Gazette 345). However, conceptually, the model set up by the Maine Matrimonial Property Act 1981 for the distribution of marital property is nearly identical to the common law view of a partnership: Fillmore (1986) 38 Maine L.R. 263, 270.
  49. Compare the position under the community property regime, which is comparable to a business partnership, since at the commencement of the marriage relationship certain property passes into community ownership: Baxter Marital Property (1973), 619.
  50. Gray Reallocation of Property on Divorce (1977), 24, *passim*. Accordingly, Gray advocates the equal sharing of matrimonial assets on divorce. Compare Scutt and Graham who argue for equality of ownership as an incident of marriage. (For Richer, for Poorer (1984)). See also Glendon State, Law and Family (1977), 270: "Even though the exclusively housewife

marriage may become obsolete, it still makes sense to may couples to view marriage as a pooling of lives, expectations and even fortunes."

51. (1970) 33 M.L.R. 601, 608.
52. Cretney (1971) 115 S.J. 614, 614, says that the Matrimonial Proceedings and Property Act 1970 (Eng.) gave the court full power to adjust both the internal and the external relationships between the parties. Subject to the constitutional restraints discussed in Chapter Five of this study, the same claim may be made of the Family Law Act 1975 (Cth.).
53. Gray Reallocation of Property on Divorce (1977), 28.
54. Ibid.
55. Ibid., 29, passim.
56. Wade Property Division upon Divorce (1982), 2.
57. See Dias Jurisprudence (3rd. ed., 1970), 248 et seq.; Paton Jurisprudence (4th. ed., 1972), Ch.3: No closer analysis will be made here, but see Finlay (1983) 10 Sydney U.L.R. 61, especially 61 to 65, and Bates (1983) 100 S.A.L.J. 664 and (1984) 58 A.L.J. 448. (Bates points out at 456 that the jurisprudential relationship between the individual and the family and the state have barely been explored so far).
58. In the tradition of March v. March and Palumbo (1867) L.R., P. and D., 440, 442 to 443.
59. See Gray Reallocation of Property on Divorce (1977), 44 and 56 and the authorities there cited. The N.Z. legislature amended the Matrimonial Property Act 1963 in 1968 in order to recognise contributions "not (of) extraordinary nature". (S. 6(1A) was inserted.) For results, see Gray, supra, 73 et seq.; Ennor (1972) N.Z.L.J. 500; Priestly (1972) N.Z.L.J. 244.
60. (1967) 116 C.L.R. 366.
61. (1976) 2 N.Z.L.R. 715.
62. (1584) 3.Co. Rep. 7a; 76 E.R. 637
63. (1976) 2 N.Z.L.R. 715, 720. See also Wachtel v. Wachtel (1973) 1 All E.R. 829, although the Court of Appeal did not resort to statute.
64. Haldane v. Haldane (1976) 2 N.Z.L.R. 715, 721.
65. Ibid., 721.
66. Haldane v. Haldane (1976) 2 N.Z.L.R. 715, 723.
67. For example, Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678, para. 652; Dunn v. Dunn (1973) 1. N.S.W.L.R. 590, 596 per Carmichael J.
68. Shone (1979) 17 Alberta L.R. 143, 146.
69. Pettitt v. Pettitt (1970) A.C. 777, 811. For a more comprehensive statement of Lord Simon's views, see (1965) Law Society Gazette 345. See also Aristotle The Politics, Book III, Ch. 4.: "(M)en and women have different parts to play in the home: his to acquire, hers to conserve."
70. March v. March and Palumbo (1867) L.R., P. and D., 440, 442 to 443.
71. Gray Reallocation of Property on Divorce (1977), 29, fn.42; 57. Note, however, that it is open to the Family Court, in deciding what, if any, maintenance order that it should make, to consider the extent to which that marriage "has affected the earning capacity of the party whose maintenance is under consideration". (S.75(2)(k)).
72. Deech (1978) 94 L.Q.R. 474, 475 remarks on this.

73. See, for example, Zappacosta (1976) F.L.C. 90-089 and Rolfe (1979) F.L.C. 90-629 at 78 272 per Evatt CJ. (It has also been accepted in New Zealand: Hofman v. Hofman (1965) N.Z.L.R. 795, 798.)
74. (1984) F.L.C. 91-507.
75. Ibid., at 79 119 and 79 132 respectively.
76. Report from the Statute Revision Committee upon the Marriage Act 1958 (Part VIII), (11th April 1961), Victorian Parliamentary Papers D.No.12, 1962, para.12.
77. Mr. Arthur Rylah, A.G., Victorian Parliamentary Debates, Legis. Ass., 12th September 1962, 117.
78. Reallocation of Property on Divorce (1977), 48.
79. Liddell (1967) 6 Melb. Uni L.R. 82.
80. See Herring J.'s judgment in Hogben v. Hogben (1964) V.R. 468. The Australian Law Reform Commission has recently considered the legislation and has concluded that, if the provision were introduced into the Family Law Act 1975, it would have little practical effect: Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 178. The Australian Institute of Family Studies has concluded that a presumption of joint ownership of the matrimonial home would have disadvantages and that uncertainties would accompany its operation: Settling Up (ed. McDonald, 1986), 246. (The opinion of respondents to the Institute's survey as to compulsory joint ownership are summarised in a table on page 247.)
81. Family Law in Australia (2nd. ed., 1979), 243.
82. Sackville (1970) Melb. U.L.R. 353, 367 et seq. and Bissett-Johnson (1972) 46 A.L.J. 436 analyse the case law and the problems proceeding from the legislation.
83. Sackville, ibid., 373. See also Kovacs (1980) 6 Uni. Tas. L.R. 227, 244.
84. See Gravina v. Gravina (1972) V.R. 678.
85. Ibid., 682. See also Pate v. Pate (No. 2) (1970) V.R. 97, 101. Gray Reallocation of Property on Divorce (1977), 49, says that, according to the words of the statute, this was the correct approach, but the opposite view was taken in Hogben v. Hogben (1964) V.R. 468, 475; Watts v. Watts (1969) V.R. 767, 773. Note that s.6A of the Matrimonial Property Act 1963 (N.Z.), which was modelled on s.161(4)(a), expressly directed the court to disregard only the wrongful conduct of the husband or of the wife which was unrelated to the acquisition of matrimonial property.
86. See speech of Mr. Arthur Rylah, Vol. 267, Victorian Parliamentary Debates, Session 1961-62, 118.
87. For an analysis of this amendment, see Chapter Four, Part B.
88. Law Comm., No. 86. The Australian Law Reform Commission recently considered the proposal but concluded that it has a number of disadvantages: Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 177.
89. Baxter (1974) 37 M.L.R. 175, 175; also Zuckerman (1978) 94 L.Q.R. 26, 57.
90. For details, see Kovacs (1980) 6 Uni. Tas. L.R. 227, passim.
91. For criticisms, see Kovacs, ibid.; Gray and Symes Real Property and Real People (1981), 149 to 150, 303; Cretney Principles of Family Law (3rd.ed., 1979), 417 to 422; Deech

- (1972) 122 N.L.J. 742; Nevitt and Levin (1973) 36 M.L.R. 345; Baxter (1974) 36 M.L.R. 345; Zuckerman (1978) 94 L.Q.R. 26; Stone (1979) 42 M.L.R. 192; Temkin (1981) 30 I.C.L.Q. 190.
92. See Garrett (1984) F.L.C. 91-539 at 79 372 (Full Court) and Parker (1983) F.L.C. 91-364 at 71 365 (Nygh J.). See also Gray Reallocation of Property on Divorce (1977), 30 et seq.; Eekelaar Family Law and Social Policy (1st. ed., 1978), 104. For attempts to do so, see Oakley Housewife (1974), 6; Fineman (1983) Wisconsin L.R. 789, 861; Knetsch (1984) 34 Uni. Toronto L.J. 263, at 275, 276, 280; Yale (1984) 34 Uni. Toronto L.R. 283, 292 to 304.
  93. Pickard (1981) F.L.C. 91-034 at 76 315.
  94. Fineman (1983) Wisconsin L.R. 789 considers that it is arguable that such a wife should qualify for an augmented contribution.
  95. Eekelaar Family Law and Social Policy (1st. ed., 1978), 104. Sir George Baker took this view in H.v.H. (1975) 2 W.L.R. 124, 131, but Chisolm and Jessep (1981) 4 U.N.S.W.L.J. 43, 62, disapprove of the decision.
  96. Ennor (1972) N.Z.L.J. 500, 506, *passim*. It appears that a woman's contribution as a hostess for her businessman husband has become recognised as valuable, for certain large Australian and international corporations provide allowances for such wives, even though they are not on the payroll, of up to \$4,000 a year: Bell The Bulletin, 5th Feb., 1985, 45. Compare Nygh J.'s statement in W. (1980) F.L.C. 90-872 at 75 526: "(T)he days have long since passed that a wife's function was merely to be an appendage of her husband and the American notion of the 'corporate wife' has never been part of our culture in any event".
  97. S.86 of the Matrimonial Causes Act 1959 (Cth.), substantially re-enacted by s.79 of the Family Law Act 1975 (Cth.), and s.5(1)(f) and s.37 of the Matrimonial Proceedings and Property Act 1970 (Eng.), substantially re-enacted in legislation introduced in 1973, 1978 and 1984.
  98. Baroness Summerskill said of the 1970 English legislation because of its discretionary basis: "A confidence trick had been played on women: they had been betrayed." (The Times, London, 7th. Nov., 1969, 15.) For a background to the passing of the Act, see Gray Reallocation of Property on Divorce (1977), 51 et seq.
  99. Wachtel v. Wachtel (1973) Fam. 72, 93 et seq. per Lord Denning. See also H. v. H. (1975) Fam. 9, 11; W. v. W. (1976) Fam. 107, 112; Harnett v. Harnett (1973) Fam. 156, 164.
  1. See McNicol (1981) 13 Melb. U.L.R. 226 for a close analysis of the position in Australia regarding constructive notice.
  2. Pilcher v. Rawlins (1872) 7 Ch. App. 259. It was so postponed in a number of cases until the House of Lords' decision in William and Glynn's Bank v. Boland (1980) 3 W.L.R. 1. The Australian position is different: an assignee of the legal estate is not affected by notice of the interest unless it would have come to his knowledge" .... if such inquiries and inspections had been made as ought reasonably have been made by him". (Hardingham and Neave Australian Family Property Law (1984), 205.
  3. Joseph v. Lyons (1884) 15 Q.B.D. 280 (chattels). Jackson Principles of Law (1967), 82, questions whether the doctrine of constructive notice applies to chattels at all.

4. For example, see Bethian Pty. Ltd. v. Green (1977) 3 Fam. L.R. 11 579; Kerabee Park Pty. Ltd. v. Daley (1978) 2 N.S.W.L.R. 222; Van Dyke v. Van Dyke (1976) 12 A.L.R. 621, 638. See also Butt (1977) 15 Law Soc. J. 329 and (1980) 54 A.L.J. 166.
5. (1964) 6 F.L.R. 182. See also Ioppolo v. Ioppolo (1978) 4 Fam. L.R. 124. Hardingham and Neave Australian Family Property Law (1984) are of the view that the law on this issue may vary from State to State. (Ibid., 219, fn. 12.)
6. Ibid., 219.
7. For a summary of the main principles regarding caveatable interests, see Hardingham and Neave, ibid., 218 to 220. For a comprehensive analysis, see Robinson Transfer of Land in Victoria (1979), Ch. 4.
8. Kovacs (1980) Uni. Tas. L.R. 227, 253 to 254, passim.
9. (1965) A.C. 1175, 1247.
10. Until 1983, English law allowed a man complete freedom of testation, even when most of "his" property had been conveyed to him from his wife by law at the wedding ceremony. In 1938, the Inheritance (Family Provision) Act came into operation. (Stone Family Law (1977), 157 to 159.) Restraints on testation had been imposed in 1900 in New Zealand (Family Protection Act) and Australian States followed suit: see generally Davern Wright Testator's Family Maintenance in Australia and New Zealand (3rd. ed., 1974).
11. See generally Hardingham, Neave and Ford Wills and Intestacy (1983), particularly 461 to 463, for principles governing a court's jurisdiction to make further provision. See also Hardingham and Neave Australian Family Property Law (1984), 279 to 282. Note that s.6 of the Family Provision Act 1982 (N.S.W.) recognizes several categories of persons, designated "eligible persons", who may make a claim against a deceased estate, so in New South Wales it is not correct to refer only to "the survivor".
12. Analysed by Nygh J. in Kenny v. Parker (1984) F.L.C. 91-546. For difficulties prior to amendment see Pertsoulis (1979) F.L.C. 90-613. See also Wade Property Division upon Marriage Breakdown, 92 to 96.
13. Under Married Women's Property legislation, rights under s.17 (or its equivalent) do not constitute a right of action which can survive the the death of a party: Crowder v. Jones (1976) Tas. S.R. 143. Proceedings between a widow and her husband's personal representative therefore lie outside the section, the time to assess whether they are between husband and wife being when the summons is taken out: Re Clague (1885) 1 W.N. (N.S.W.) 110.
14. (1986) F.L.C. 91-732.
15. Analysed by Nygh J. in Kenny v. Parker (1984) F.L.C. 91-546. For difficulties prior to amendment, see Pertsoulis (1979) F.L.C. 90-613. See also Wade Property Division upon Marriage Breakdown (1984), 92 to 96.
16. Re the Estate of Krause (1983) F.L.C. 91-320; Dobell v. Van Demac (1982) V.R. 425; Re Prakash (1981) Qd.R.189; Re Lack (1980) Qd. R. 22.
17. Note that "fault" has a greater relevance under Testator's Family Maintenance legislation: see Davern Wright Testator's Family Maintenance in Australia and New Zealand (1974), 52 to 64. Claims under the legislation are based predominantly on the needs of the applicant whereas s.79 claims are based



- mainly on the contribution of the applicant: see the judgment of Stephen J. in White v. Barron and Others (1980) 54 A.L.J.R. 333.
18. Note the effects of Williams and Glyn's Bank v. Boland (1980) 3 W.L.R. 138 (H.L.), discussed below.
  19. Third Report on Family Property: the Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods (1978), No. 86, paras. 1.54 to 1.59.
  20. Temkin (1981) 30 I.C.L.Q. 190 for details.
  21. Ibid., 205.
  22. See also Stone (1979) 42 M.L.R. 192; Zuckerman (1978) 94 L.Q.R. 26; Murphy and Rawlings (1980) 10 Fam. Law 136. New Zealand's Matrimonial Property Act 1976 allows a non-owner spouse to lodge a notice of interest which has the effect of a caveat. The Australian Law Reform Commission recently examined this provision and concluded that its success depends on registration and that is unlikely to be carried out until marriage breakdown: Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 182.
  23. (1980) W.L.R. 138.
  24. Williams and Glyn's Bank v. Boland (1980) 3 W.L.R. 138 at 148.
  25. (1983) F.L.C. 91-362.
  26. Ont. L.R.C. Report on Family Law, Part IV, Family Property Law (1974), 140.
  27. Ibid. See Chapter Six, part D (b)(iv) for details. The proposal has been considered by the Australian Law Reform Commission.
  28. This is clear from the Australian Law Reform Commission's Discussion Paper No. 22 Matrimonial Property Law (June 1985), paras. 184 to 193.
  29. Law Com. No. 86. Third Report on Family Property: The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods (1978), paras. 3.05, 3.08 and 3.09.
  30. (1980) 6 Uni. Tas. L.R. 227, 245.
  31. Ibid., 245 to 246.
  32. Kovacs (1980) 6 Uni. Tas. L.R. 227, 248.
  33. Kovacs, ibid., 249, takes this view.
  34. New Zealand has this exception (Matrimonial Property Act 1976, s.45.)
  35. This is discussed in part B of Chapter Four.
  36. Kovacs (1980) 6 Uni. Tas. L.R. 227, 250, passim.
  37. Weitzman in The Resolution of Family Conflict (ed. Bekelaas and Katz, 1984) 461 at 462, passim.
  38. (1970) A.C 777, 817.
  39. Ibid., 819.
  40. Family Law and Social Policy (1st. ed., 1978), 105; Gray Reallocation of property on Divorce (1977), 127 et seq.
  41. (1964) Yale L.J. 733; Karowe (1974) 39 Albany L.R. 52, 78.
  42. Weitzman has found that the earning capacity of a working spouse is more valuable than the tangible assets of a marriage partnership: (1981) 28 U.C.L.A.L.R. 1181. The increasing importance of human capital as opposed to traditional property is outlined by Glendon The New Family and the New Property (1981).
  43. Settling Up (ed. McDonald, 1986), 68.

44. Settling Up (ed. McDonald, 1986), ibid. Some benefits fall in the grey area between property and income. Such benefits include such job-related fringe benefits as company cars, low interest housing loans, holidays provided through one's employment and taxation benefits: op. cit., 173.
45. Bailey (1980) 54 A.L.J. 190, 191 to 192 points out that a statutory system of sharing can lead to unjust results.
46. A community of acquisitions excludes from sharing property acquired before marriage and gifts and legacies acquired after marriage as well as, in the main part, income derived from such property.
47. The English Law Comm. Report on the Financial Consequences of Divorce (No. 112 of 1981), para. 13, recommended private ordering of financial matters. See also Sinclair (1983) 32 I.C.L.Q. 785, 810.
48. New Zealand, France, Germany, Scandinavia and various American States permit parties to make pre-nuptial contracts. The limited deferred community of property regime affects only those parties who have not entered into legally-permitted contracts of their own.
49. Cripps (1978) 9 V.U.W.L.R. 101.
50. The position with "maintenance agreements" and pre-nuptial settlements is different. For the law on s.87, see Kovacs (1983) 7 Uni. Tas. L.R. 249. Settlements are not considered to be contrary to public policy so long as their ostensible effect is to provide for a spouse on the basis that the marriage is to continue.
51. Hyman v. Hyman (1929) A.C. 601.
52. Hannema (1981) 7 Fam. L.R. 542.
53. Goodman (1982) 13 Fed. L.R. 131, 149.
54. Kovacs (1983) 7 Uni. Tas. L.R. 249. A section 87 agreement must relate to financial matters (whether or not it also makes provision for other matters), must be in writing or evidenced in writing, and must be approved by the Family Court. Such an agreement regulates maintenance; there is no specific provision in the Act enabling spouses to control their property rights in the same manner.
55. Note that Watson J. in Macsok (1976) F.L.C. 90-045 indicated that he would be willing to do so.
56. Kovacs (1980) 6 Uni. Tas. L.R. 227, 257, fn.103, cites two unreported decisions of Pawley J. on s.87(4) of the Act in support of this claim.
57. (1982) 2 N.S.W.L.R. 80, analysed by Bates (1983) 57 A.L.J. 460.
58. Bates, ibid., 467.
59. For example, Kovacs (1980) 6 Uni. Tas. L.R. 227, 257; Goodman (1982) 13 F.L.R. 131, 149; Scutt and Graham For Richer, for Poorer (1984), 17; Rheinstein (1976) 12 Willamette L.J. 413, 435.
60. Report on the Family Law Act (1980), Vol. 1, para. 5.152.
61. The Act also provides for the formation of separation agreements.
62. This provision closely follows the recommendations of the New South Wales Law Reform Commission: See para. 11.49 of its Report on De Facto Relationships, 1983. Under the provisions of s.86 of the Family Law Act 1975, married persons may draw up agreements regarding future financial matters between them. Whereas the maintenance elements of a s.86 agreement

- can frequently be varied under s.86(2), its property provisions can be varied only once by using s.79: Sykes and Sykes, Dotch and Others (1979) F.L.C. 90-652.
63. Glendon State, Law and Family (1977), 272, sees the need for legal regulation of such contracts.
  64. Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 95. See also Tennison Family Court: The Legal Jungle (1983), 97.
  65. In Fryda and Johnson (No. 2) (1981) F.L.C. 91-058 at 76468; Green and Kwiatek (1982) F.L.C. 91-259 at 77459. See now 0.17, r.2 of the Family Law Rules.
  66. As to disclosure, see Chapter Five, under the heading "Section 79A".
  67. Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 95. The A.L.R.C. notes that second marriages are increasing in number: in 32% of the marriages celebrated in 1983, at least one of the spouses had been married before. In 1975, the proportion was 19%: ibid., para. 7. It should be noted that the Australian Institute of Family Studies, which has conducted a survey of divorced couples, favours the introduction of a right for couples to "contract out", subject to certain controls: Settling Up (ed. McDonald, 1986), 322. For instance, such a contract would be unenforceable if based on the commission of matrimonial fault: ibid., 322.
  68. See the discussion in Chapter Five under the heading "Section 79".
  69. Matrimonial Property Act 1976 (N.Z.), s.14. Regarding the difficulties involved in interpreting this section, and by implication, the Ontario and Saskatchewan legislation which has similar exceptions, see Atkin (1977) N.Z.L.J. 81, 84; Collins (1977) N.Z.L.J. 238.
  70. For an appreciation of the legislation, see Fisher (1978) N.Z.L.J. 375; McCall (1982) 14 U.W.A.L.R. 365, 380; 403 to 404. For difficulties in defining "family assets", see Atkin (1985) N.Z.L.J. 25. For a general discussion, see Gray Reallocation of Property on Divorce (1977). See also Bates (1981) 14 C.I.L.S.A. 260, 266 et seq.
  71. (1980) 6 Uni. Tas. L.R. 227, 254.
  72. This is the view posited by Scutt and Graham in For Richer, for Poorer (1984). It should be noted, however, that too restrictive or protective a regime will have the effect of inhibiting third parties in their dealings with the spouses: Brown (1971) 4 Ottawa L.R. 331.332.
  73. Bailey (1980) 54 A.L.J. 190, 191; Baxter (1975) 25 Uni. Toronto L.J. 236; Fillmore (1986) 38 Maine L.R. 263, 270.
  74. Matrimonial Property: Where Do We Go From Here? (1971), 38.
  75. This distinction has actually been built into the Ontario legislation: the assets subject to presumptive equal sharing are those actually used for family purposes, thus excluding savings and investments for future use, which can only be shared on satisfaction of the principle of contribution.
  76. Kahn-Freund Matrimonial Property: Where Do We Go From Here? (1971), 39.
  77. (1972) Current Legal Problems 84, 111.
  78. Yet in para. 1.127 of Published Working Paper No. 42, Family Property Law, the English Law Commission recommended that co-ownership of the matrimonial home be introduced by

operation of law, since this would obviate the need to consider whether either spouse had made a financial contribution.

79. (1972) N.Z.L.J. 500, 507.
80. Ibid.
81. Freeman (1972) Current Legal Problems 84, 112.
82. Ibid.
83. Matrimonial Property: Where Do We Go From Here? (1971), 42.
84. Ibid., 19.
85. There was no mutual obligation of support. Compare the position in Australia, where s.72 of the Family Law Act 1975 provides that either spouse may be required to maintain the other where that other party is "unable to support herself or himself adequately..."
86. Eekelar Family Law and Social Policy (1st. ed., 1978), 171 to 172.
87. See s.156(1) Marriage Act 1958 (Vic.); s.92 (1) Law of Property Act 1936-1980 (S.A.); s.3(2), s.3(3), s.11(1) Married Women's Property Act 1935 (Tas.); s.2 Married Women's Property Act 1952 (Qd.); s.18 Married Women (Restraint upon Anticipation) Act 1980 (Qd.); s.3(2) Married Persons (Property and Torts) Act 1901 (N.S.W.); s.1(2) Married Women's Property Act 1892-1962 (W.A.) Commonwealth legislation now concedes the capacity to spouses to bring proceedings in contract and tort against each other: s.119 of the Family Law Act 1975 (Cth.).
88. McDowell (1965) 45 Boston U.L.R. 43, passim.
89. Lloyd v. James (1895) 16 L.R. (N.S.W.) 18.
90. Tas. s.11(1) Married Women's Property Act 1935; W.A. Married Women's Property Act 1895, s.1.
91. Note that the common law rule that a husband could not sue his wife in tort nor a wife her husband was abrogated by s.12 of the Married Women's Property Act 1881 (Eng.) to the extent of enabling a married woman to sue her husband for the protection of her separate property but in all other respects it remained in all its ancient rigour.
92. For details of State legislation and its ramifications, see Hardingham and Neave Australian Family Property Law (1984), 28 to 30.
93. Ibid., 30.
94. (1984) F.L.C. 91-552.
95. See Chisolm and Jessep (1981) 4 U.N.S.W.L.J. 43, 61 to 62 for comment.
96. For an analysis of the family values of all major ethnic groups in Australia, see Ethnic Family Values in Australia (ed. Storer, 1985).
97. (1984) F.L.C. 91-507 at 79 110.
98. The extent to which our legal system should recognise the differing cultural and social values of litigants was examined by the Full Court in Goudge (1983) F.L.C. 91-534, a custody dispute over three part Aboriginal children.
99. For figures showing the country of origin of immigrants between 1947 and 1983, see Storer Ethnic Family Values in Australia (1985), note 8, page 7.
1. For a comparison of the separate and community property systems, see Bailey Community of Property (Discussion paper for National Women's Advisory Council, 1982).

2. Among the best descriptions of this system are those of Eekelaar Family Security and Family Breakdown (1971), 101 & Baxter (1975) 25 Uni. Toronto L.J. 236. Hon. Justice McCall in Family Law and Property: 3 Essays (McCall, Dickey and Wade, 1980), 1 at 14 claims that in the first three or so years of the Family Law Act's operation, there was the development of an embryonic system of deferred community of property but it is submitted that the High Court's decision in Mallet v. Mallet (1984) F.L.C. 91-507 has exercised a change in the law's direction: see Chapter Five.
3. By the Matrimonial Property Act 1976 (N.Z.) (enacted shortly after the Privy Council's decision in Haldane v. Haldane (1976) 2 N.Z.L.R. 715), the Family Law Reform Act 1978 (Ont.) and the Matrimonial Property Act 1979 (Sask.)
4. Stone (1978) 16 Alberta L.R. 375, 384; Law Comm. No. 52 First Report on Family Property: A New Approach, paras. 46 to 56.
5. Kovacs (1980) 6 Uni. Tas. L.R. 227, 256. For the European position, see Neumayer in The Reform of Family Law in Europe (ed. Chloros, 1978), 1 at 13. In Texas, a presumption of fraud arises in respect of excessive or capricious gifts of community property: Givens v. Guardian Life Insurance Co. of America (1972) 480 S.W. 2d. 421, 425; Reaney v. Reaney (1974) 505 to W2d. 338, 340.
6. Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 172.
7. Ibid., para. 123.
8. Ibid., paras. 141 to 148. See also Goodman (1981) 16 Aust. J. Social Issues 175, 185.
9. Reich (1964) 73 Yale L.J. 733 analyses its significance.
10. Kovacs (1980) 6 Uni. Tas. L.R. 227, 234.
11. Ibid., 234 to 235.
12. As opposed to a full community of property as practised in South Africa.
13. Parts of Europe, Scandinavia and eight American States (Arizona, Nevada, California, New Mexico, Louisiana, Texas, Idaho, and Washington).
14. Fixed entitlement schemes have been proposed by Gray Reallocation of Property on Divorce (1977) (criticised by Deech (1978) 94 L.Q.R. 474) and Scutt and Graham For Richer, for Poorer (1984)). It is not within the scope of this study to discuss these hypotheses in detail.
15. The introduction of the system was advocated in England in the Law Commission's Working Paper No. 42 Family Property Law (1971). The concept had been promoted by such jurists as Friedmann, Kahn-Freund and Freeman. In Australia, the major political parties have indicated their support for the concept, and the Australian Democrats have included its introduction in their party platform. However, in Discussion Paper No. 22, Matrimonial Property Law (June 1985), the A.L.R.C. has advised against its introduction and public response to the Discussion Paper has not revealed substantial support for a community property regime during marriage: (1985) Reform 135.
16. Gray Property Division upon Divorce (1982), 83, lists examples of legislation which sets out lists of criteria designed to provide guidelines for the judiciary.
17. Pound Introduction to Philosophy of Law (1961), 68.

18. The Matrimonial Proceedings and Property Act 1970 was incorporated into Part II of the Matrimonial Causes Act 1973.
19. Law Comm. No. 86 Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978), para. 1.82.
20. Miller (1984) Cambrian Law Review 73 analyses all legislation relating to matrimonial property law enacted in England since 1970. Alcock (1984) 11 J. of Law and Society 357 discusses the 1984 legislation, which maintains the tenor of the Acts of 1970 and 1973.

PART B:

21. It has been criticised for being adopted without the benefit of detailed recommendations from a committee of inquiry (Sackville in Social Security and Family Law (ed. Samuels, 1979) 83, 84) except for the somewhat sporadic intervention of the Senate Standing Committee on Constitutional and Legal Affairs, whose main contribution was to offer amendments to the draft legislation prepared by the Attorney-General's Department.
22. (1977) F.L.C. 90-217.
23. The correctness or otherwise of this statement will be discussed in succeeding chapters.
24. De Winter v. De Winter (1979) F.L.C. 90-605 at 78 092.
25. Mallet v. Mallet (1984) F.L.C. 91-507 (High Court). For a useful commentary, see the judgment of Brennan J. in Norbis v. Norbis (1986) F.L.C. 91-712, particularly at 75 177. See also Wade (1984) 15 F.L.R. 76.
26. For a survey of both the advantages and disadvantages of the use of judicial discretion to determine property orders, see Wade Property Division upon Marriage Breakdown (1984), 155; Wade (1984) 15 F.L.R. 76.
27. Australian Law Reform Commission Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 174. See further, since the decision in Norbis v. Norbis (1986) F.L.C. 91-712, in (1986) Reform at 126 to 127.
28. (1985) Reform 134, 136. 80% of the female and 66% of the male respondents expressed approval of the discretionary system.

## CHAPTER FOUR

### INTRODUCTION:

1. Hereinafter cited as Russell: Farrelly (1976) 50 A L.J.R. 594.
2. Ibid.
3. Property Division upon Divorce (1982), 68 to 69.
4. See further Part A of this chapter.

### PART A:

5. Note than England is untrammelled by the constitutional conditions applying in Australia. In New Zealand the responsibilities of government are entrusted to a uni-cameral parliament which relies on unwritten and ill-defined constitutional arrangements: Hon. Justice Woodward in "The Judge in Today's Society" in Auckland Law School Centenary Lectures (1983), 102.
6. The referendum in 1946 added placetum (xxiiiA).
7. The "marriage power". For the meaning of "marriage", see Lane (1978) 52 A.L.J. 121, 121 to 123; Poulter (1979) 42 M.L.R. 409; Finlay Family Law in Australia (3rd. ed. 1983), 50 to 54.
8. Referred to henceforth as the "matrimonial causes power". For the meaning of "matrimonial cause", see Lane, ibid., 129 to 130; Finlay ibid., 54 to 59. See also Finlay (1971) 4 Fed. L.R. 287.
9. The "implied incidental power".
10. (1919) 2 K.B. 571.
11. On legal rights and duties, see Paton Jurisprudence (4th. ed. 1972), Ch. 3; Finlay (1983) 10 Syd. L.R. 61, 61 to 63. See also Bates (1983) 100 S.A.L.J. 664 and (1984) 58 A.L.J. 448, especially at 456, regarding the fact that the jurisprudential relationship between the individual and the family and the state have not yet been explored.
12. Finlay Family Law in Australia (3rd. ed. 1983), 48.
13. Finlay (1983) Syd. L.R. 61, 62, traces the development of the concept of "family law". Regarding the lack of a definition of the notion of "family", see Dickey (1982) 14 U.W.A.L.R. 417.
14. Section 15A of the Acts Interpretation Act 1901-1966 requires that an Act be read and construed subject to the constitution and the Engineer's Case (1920) 28 C.L.R. 29 decided that the heads of power are not to be construed narrowly.
15. As in Attorney-General (Vic.) v. Commonwealth (1962) 107 C.L.R. 529; Lansell v. Lansell (1964) 110 C.L.R. 366; Antonarkis and Anor. v. Delly and Anor. (1976) F.L.C. 90-063; Re Dovey; ex parte Ross (1979) F.L.C. 616.
16. As in Russell:Farrelly (1976) 50 A.L.J.R. 594; R. v. Lambert; ex parte Plummer (1980) F.L.C. 90-904; Ascot Investments Pty. Ltd. v. Harper and Harper (1981) F.L.C. 91-000; Vitzdamm-Jones v. Vitzdamm-Jones (1981) F.L.C. 91-012. The leading exposition on the doctrine of judicial review appears in the Communist Party Case (1951) 83 C.L.R. 1 at 262 to 263 per Fullagar J.

17. See, e.g., Cornack v. Cope (1974) 131, C.L.R. 432, 451 to 155; 473 to 474; The Australian Assistance Plan Case (1975) 134 C.L.R. 335 at 364, 379, 380; The Territorial Senators Case (1975) 134 C.L.R. 201 at 233, 264.
18. A.-G. (N.S.W.) v. Brewery Employees Union of N.S.W. (1908) 6 C.L.R. 469, 501.
19. Finlay Family Law in Australia (3rd. ed. 1983), 48. See also Sackville and Howard (1970) 4 Fed.L.R. 30. Lane (1978) 52 A.L.J. 121, 131, takes a different view: "To the constitutionalist [the powers in s.51 (xxi) and s.51 (xxii)] are expansive ...."
20. (1981) 55 A.L.J.R. 192 at 198, 203, respectively.
21. See Cowen and Medes da Costa Matrimonial Causes Jurisdiction (1961), 2 to 3, 4 to 8 for a survey of the Commonwealth legislation in the field before 1959.
22. See A.-G. (Vic.) v. Commonwealth (The Marriage Act Case) (1962) 107 C.L.R. 529 at 582 per Windeyer J.
23. (1962) 107 C.L.R. 529 at 582 per Windeyer J.
24. Ibid., per Taylor J. at 560 and Menzies J. at 572. See also Russell: Farrelly (1976) 134 C.L.R. 495, 539 to 540 per Mason J.
25. This is a misnomer: see Ong (1984) 14 Melb. U.L.R. 660, 680 and 681.
26. Or the "pendent jurisdiction": Lane (1978) 52 A.L.J. 121, 124.
27. Granall v. Marrickville Margarine Pty. Ltd. (The Granall Case) (1955) 93 C.L.R. 55, 77; Gazzo v. Comptroller of Stamps (Vic.): ex parte A.-G. (Vic.) (1981) A.L.R. 25, 56, per Aickin J.
28. (1981) 55 A.L.J.R. 120.
29. (1983) 57 A.L.J.R. 317.
30. (1983) 57 A.L.J.R. 731.
31. Philip Morris (1981) 55 A.L.J.R. 120 at 137 (Mason J.); Fencott v. Muller (1983) 57 A.L.J.R. 317 at 324 (Gibbs CJ.), at 329 (per Mason, Murphy, Brennan and Deane JJ.); and Stack v. Coast Securities (No.9) Pty. Ltd. (1983) 57 A.L.J.R. 731 at 734 (Gibbs CJ.) and 740 (Mason, Brennan and Deane JJ).
32. Philip Morris, ibid., Stack v. Coast Securities, ibid.
33. Philip Morris, ibid., 133 per Gibbs CJ., 150 per Aickin J., 154 per Wilson J. (Barwick CJ. thought s.32 was invalid: at 126). See Gubbay (1984) F.L.C. 91-545 at 79 414 per Nygh J.
34. Gubbay, ibid., at 79 412 per Nygh J.
35. (1984) F.L.C. 91-555.
36. See also Harris (No. 2) (1981) F.L.C. 91-545 at 76 714 (Watson SJ.) and Smith (No.2) (1985) F.L.C. 91-545 at 76 714 (Watson SJ.) and Smith (No. 2) (1985) F.L.C. 91-604 at 78 893 (Evatt CJ.).
37. (1981) 55 A.L.J.R. 120.
38. (1984) F.L.C. 91-555.
39. It was also discussed by Gibbs J. in Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606, although his Honour made no distinction between federal and non-federal jurisdiction: see 78 103. The Full Court discussed the associated jurisdiction of the Family Court in McKay (1984) F.L.C. 91-573 and Smith (No. 2) (1985) F.L.C. 91-604.
40. Re Ross-Jones and Marinovich; ex parte Green (1984) F.L.C. 91-555 at 79 488 per Gibbs CJ.



41. (1981) 55 A.L.J.R. 120 (that is, Barwick CJ. and Gibbs, Stephen, Mason and Murphy JJ.; Aickin and Wilson JJ dissented.)
42. Philip Morris, *ibid.*, at 137.
43. (1983) 57 A.L.J.R. 317, 329 to 330. Other tests of a similar nature have been suggested by the High Court from time to time. Evatt CJ. canvasses these in Smith (No. 2) (1985) F.L.C. 91-604 at 79 897 to 79 898.
44. (1955) 93 C.L.R. 55, 71, *per* Dixon CJ., McTiernan, Webb and Kitto JJ.
45. (1983) 57 A.L.J.R. 317, 330.
46. (1984) F.L.C. 91-545 at 79 414.
47. See also Scaggiante and Harrison (1978) F.L.C. 90-407 but note the judgment of Murphy J. in Re Ross Jones, ex parte Beaumont (1979) F.L.C. 90-606 and the result in A. and A. (1981) F.L.C. 91-070.
48. Gubbay (1984) F.L.C. 91-545.
49. The judgment of Fogarty SJ. (with whom Pawley SJ. agreed) in Prince (1984) F.L.C. 91-501 has a close statement regarding the Family Court's accrued jurisdiction. This was applied by Treyvaud J. in Wallace (1984) F.L.C. 91-553. See also Ireland (1986) F.L.C. 91-731. Descriptions of the associated jurisdiction of the Family Court are also found in these cases.
50. In Madjeric (1984) F.L.C. 91-552, Elliott J. relied on s.119 to permit a wife to bring a tortious claim in the Family Court since it was associated with a matter within the Court's jurisdiction.
51. (1980-81) 33 A.L.R. 465, 475. (His Honour appears to have been misquoted in (1981) 148 C.L.R. 457 at 475 and (1981) 55 A.L.J.R. 120 at 126: see Fitzgerald J. in Stack (1983) 46 A.L.R. at 475 to 476.)
52. Contrast the view of Gibbs CJ. in Perlman v Perlman (1984) F.L.C. 91-500 at 79 058. His Honour said that the remedies for enforcement which may be exercised by the Family Court are those expressly provided by the Act itself. However, Evatt CJ. in Smith (No. 2) (1985) F.L.C. 91-604 at 78 895 pointed out that this passage is at variance with other observations.
53. (1985) F.L.C. 91-604 at 79 894.
54. The Full Court in Prince (1984) F.L.C. 91-501 declined to do so.
55. See Philip Morris Case (1981) 55 A.L.J.R. 120, 125, *per* Barwick CJ.
56. Property Division upon Marriage Breakdown (1984), 36 to 37.
57. Lane (1978) 52 A.L.J. 121, 123.
58. Marriage Act Case (1963) 107 C.L.R. 529, 560, *per* Taylor J. Menzies J. at 572 and Owen J. at 603 expressed similar views.
59. *Ibid.*, *per* Windeyer J. at 580. See also Jacobs J. in Russell:Farrelly (1976) 134 C.L.R. 495, 548: "(M)arriage can be regarded as a social relationship for the mutual society, help and comfort of the spouses."
60. For a very expansive view of the "marriage power", see the judgment of Murphy J. in Re Ross Jones; ex parte Beaumont (1979) F.L.C. 90-606 at 78 109.
61. (1976) 134 C.L.R. 493 at 540.
62. *Ibid.*, *per* Mason J., 538.
63. Russell:Farrelly (1976) 134 C.L.R. 495 at 552-3 *per* Jacobs J.

64. Ibid., at 511. However, he was not prepared to go as far as the majority, who not only envisaged the substantive proprietary rights assumed by the Chief Justice, but also would permit a federal jurisdiction to deal with the enforcement of such rights. It is interesting to note that only about 30% of divorced people come to the Family Court about their property or children: (1985) Reform 24. This is apparently due to a desire among many not to provoke the other spouse; an inability to afford a lawyer; a misconception that the Family Court is only about litigation, judges etc.; or a belief that the particular problem is too small for the Family Court to handle. (Ibid.).
65. See Mason J. in Russell:Farrelly (1976) 134 C.L.R. 495 at 539: "(I)t is necessary to acknowledge that Ch. III (of the Constitution containing ss.71 to 80) makes special provision for defining and investing jurisdiction in courts". The Commonwealth Parliament's power to confer exclusive jurisdiction in matrimonial causes on the Family Court derives from s.77(ii) of the Constitution.
66. For State Courts, the powers lie in s.77(iii) with s.76(ii) and s.51(xxi) plus incidental powers.
67. E.g., see A-G for N.S.W. v. Brewery Employees' Union of N.S.W. (Union Label Case) (1908) 6 C.L.R. 469 per Higgins J.; King v. Jones (1972) 128 C.L.R. 221 per Barwick CJ. at 229; Lansell v. Lansell (1964) 110 C.L.R. 353 at 366 per Taylor J.; per Kitto J. at 361-2.
68. Ibid., at 369.
69. Ibid., at 363, per Kitto J.
70. Green v. Lord Penzance (1881) 6. App. Cas. 657, 671; relied on by Starke J. in Ex parte Walsh and Johnson; In re Yates (1935) 37 C.L.R. 36, 131.
71. (1981) 33 A.L.R. 465 at 488.
72. Relying on State of S.A. v. State of Vic. (1911) 12 C.L.R. 667 at 675.
73. Philip Morris Case (1981) 33 A.L.R. 465 at 488.
74. (1984) F.L.C. 91-552, 79 461.
75. See also St. Justins Properties Pty. Ltd. & Ors v. Rule Holdings Pty. Ltd. (1980) 40 F.L.R. 282.
76. Finlay Family Law in Australia (3rd ed., 1983), 55.
77. The Constitution, S.109, presents no safe solution to this dilemma: infra.
78. Note, however, that since the only ground for divorce under the Family Law Act 1975 is irretrievable breakdown of marriage evidenced by the parties' living separately and apart, proceedings undertaken for divorce under s.48(2) are based purely on evidence (Cretney Principles of Family Law (3rd. ed., 1979), 101) and, because legal obligations are not involved, no justiciable issue arises between the parties.
79. Finlay Family Law in Australia (3rd. ed., 1983), 57.
80. Sackville and Howard (1970) 4 Fed.L.R. 30, 57.
81. As will be seen below, as a result of the High Court decision in Russell:Farrelly (1976) 50 A.L.J.R. 594, the Family Court of Australia suffers from the disadvantage of being jurisdictionally incompetent to decide some matters concerning property.
82. Lansell v. Lansell (1964) 110 C.L.R. 353 illustrates this point.

83. Ibid. Sackville and Howard (1970) Fed. L.R. 30, 53, analyse the case.
84. This section utilised the same formula as that in s.4(1)(ca) in the definition of "matrimonial cause" prior to the 1983 amendments.
85. (1964) 110 C.L.R. 353, 362.
86. (1967) 116 C.L.R. 366.
87. See Barwick CJ. at 375, Windeyer J. at 380.
88. Sackville and Howard (1970) 4 Fed. L.R. 30, 57.

#### PART B:

89. Note that s.31 (1)(a) as amended by the Family Law Amendment Act 1983 confers jurisdiction with respect to "matters arising under this Act .... in respect of which matrimonial causes are instituted .... under this Act". To come within the jurisdiction specified in this sub-paragraph, the matter must arise under the Family Law Act and be one in respect of which a matrimonial cause can be instituted.
90. s.5(1)(c). See Lansell v. Lansell (1964) 110 C.L.R. 353 for its interpretation.
91. (1976) 50 A.L.J.R. 594.
92. On January 5th, 1976.
93. Barwick CJ., Gibbs, Stephen and Mason JJ.; Jacobs J. dissenting. For the contrary view, see the Marriage Act Case (1962) 107 C.L.R. 529 at 602 and 560 to 561 per Owen J. and Taylor J. respectively. See also Sackville and Howard (1970) 4 Fed.L.R. 30.
94. Family Law Amendment Act 1976 (No. 63 of 1976), which was assented to less than a month after Russell:Farrelly was decided. See Bailey (1984) 58 A.L.J. 369, 376.
95. (1976) 50 A.L.J.R. 594.
96. (1977) F.L.C. 90-307 at 76-631 to 76 632.
97. And in the areas of child custody and child maintenance as well.
98. Tansell (1977) F.L.C. 90-307 (Full Court) brought to an abrupt halt the practice of invoking the declaration as to validity of the marriage as a fiction to attract the property jurisdiction of the Court. See Read (1977) F.L.C. 90-201 as an example of a case where a question of validity had been used in this manner. Moreover, the dismissed declaration application cannot be counted as a "completed proceeding" for property relief within S.4(1)(ca) (ii) if it is dismissed for lack of bona fides rather than for lack of merits: Tansell, supra.
99. Part III Marriage Act 1961 (Cth.)
  1. See Nygh J. In Baba and Jarvinen (1980) F.L.C. 90-882. Note that Treyvaud J. was prepared to entertain a property application based on an application for a dissolution which had been dismissed on the grounds that separation under the one roof did not constitute the separation required by s.48(2): Thompson (1980), unreported, cited by Kovacs (1983) 13 Fed.L.R. 201, 210.
  2. Passed as a result of Russell:Farrelly. For both s.29 and s.30, see McCall (1982) 14 U.W.A.L.R. 365 at 380 et seq.; for s.30, see Hardingham and Neave Australian Family Property Law (1984), 276 to 278.

3. Until the passage of the Family Law Amendment Act 1983 (Cth.)(see below), both systems were the same. But see Stowe (1981) F.L.C. 91-027, where non-federal proceedings were restrained under s.114 (1) of the Family Law Act.
4. Except insofar as the disposition can be caught by the operation of s.85: see Chapters Five and Six.
5. See further Chapter Five under heading "Section 79".
6. Ibid.
7. (1979) 90-627, overruling McCarney (1977) F.L.C. 90-200.
8. The main issue to be resolved by the Court was whether in the circumstances it was appropriate to allow the wife to proceed ex parte.
9. Tansell (1977) F.L.C. 90-307; Sieling (1970) F.L.C. 90-627; Esmore (1979) F.L.C. 90-711. Since Mullane v. Mullane (1983) F.L.C. 91-303, there is no longer a need for an injunction to be "temporary" but it must be limited in duration.
10. Badcock (1979) F.L.C. 90-723; Cullen (1980) 90-899; Craven (1980) F.L.C. 90-802.
11. For example, Hogan J. dubitante in Craven, ibid.
12. Esmore (1979) 90-711 (Nygh J.) and Macvean (1980) 90-112 (Gee J.).
13. (1981) F.L.C.91-027 (preventing a spouse from dealing with the property by subdividing and selling it).
14. (1981) F.L.C. 91-114 (to prevent a party from seeking Supreme Court orders winding up a family company). In both these cases the injunction was directed at assets held by family companies, in itself a considerable extension of Family Court injunction: see Chapter Six.
15. (1981) F.L.C. 91-027.
16. This was the basis on which Asche SJ. dissented in Sieling (1979) F.L.C. 90-627 at 78 265: the right to apply for principal relief might never arise, as one party might die or the parties might become reconciled.
17. Schmidt (1980) F.L.C. 90-873; Sims (1981) 91-072.
18. S.79(8) as inserted by the 1983 amendments.
19. Rieck (1981) F.L.C. 91-067.
20. Martiniello (1981) 91-050.
21. Baba and Jarvinen (1980) F.L.C. 90-882.
22. Kovacs (1983) 13 F.L.R. 201.
23. Alternatively called a Stowe order.
24. Submission of lawyers of the Australian Legal Aid to the Joint Select Committee on the Family Law Act.
25. Family Law in Australia (3rd ed., 1983), 95.
26. Their findings are set down in Family Law in Australia: A Report of the Joint Select Committee on the Family Law Act (1980). For an assessment of its findings, see Editorial Comment (1981) 55 A.L.J. 1.
27. Report, ibid., paras. 2.26 to 2.50.
28. Ibid., para. 5.155. The Attorney-General gave a reference on these terms to the Australian Law Reform Commission on 16th June 1983.
29. Ibid., para. 2.67.
30. Note, however, that a minority of the Court, Barwick CJ. and Gibbs J. held that, under the Constitution, the matrimonial causes power (s.51(xxii)) and the marriage power (s.51(xci)) must be read together. So read, the power to legislate for matrimonial causes falls within s.51(xxii). This provision requires that ancilliary proceedings may be only between the

- parties to a marriage and in relation to proceedings for principal relief. The majority (Mason J., with whom Stephen J. agreed on this issue, and Jacobs J.) decided that placeta (xxi) and (xxii) need not be read together.
31. Ibid., para. 2.63. As examples, they gave the home and its contents, the family car or a business partnership between the parties.
  32. Russell:Farrelly (1976) 50 A.L.J.R. 594, 612.
  33. The Joint Select Committee suggested several courses of action as a solution to the problems of the divided jurisdiction in matrimonial property matters: Report of the Joint Select Committee on the Family Law Act (1981) Vol. 1, paras. 2.26 to 2.50; 2.61 to 2.70. The following is a result of its recommendation that immediate steps be taken to close the hiatus.
  34. Ibid., para. 2.71.
  35. (1976) 50 A.L.J.R. 594.
  36. S.4(1), definition of "matrimonial cause", paragraph (ca)(i).
  37. (1984) F.L.C. 91-554. See analysis in (1985) Reform 18,19.
  38. Murphy J. dissented.
  39. For example, see Cormick v. Salmon (1984) F.L.C. 91-554 at 79 472 per Gibbs CJ.
  40. Ibid., 79 473; see also the Union Label Case (1908) 6 C.L.R. 469 at 501 per Griffith CJ.
  41. Cormick v. Salmon (1984) F.L.C. 91-554 at 79 476.
  42. This is in line with the recommendation of the Joint Select Committee and the decision in Russell:Farrelly (1976) 50 A.L.J.R. 594.
  43. (1984) 58 A.L.J. 369, 369.
  44. Compare Vitzdamm-Jones v. Vitzdamm-Jones; St. Clair v. Nicholson (1981) F.L.C. 91-012 with R. v. Lambert; ex parte Plummer (1980) 55 A.L.J.R. 71 and Gazzo v. Comptroller of Stamps (Vic.); ex parte A-G (Vic.) (1981) F.L.C. 91-101.
  45. (1984) F.L.C. 91-554. See also Re F: ex parte F. (1986) F.L.C. 91-739.
  46. (1984) F.L.C. 91-555.
  47. (1979) F.L.C. 90-616 at 78 191.
  48. (1976) F.L.C. 90-079 at 75 381.
  49. A similar view was taken in Farr (1976) F.L.C. 90-133 at 75 635 to 75 636 (Murray J.); Bak (1980) F.L.C. 90-877 at 75 550 (Opas J.); and Murkin (1980) F.L.C. 90-806 at 75 802 (Nygh J.).
  50. (1979) F.L.C. 90-616 at 78 189.
  51. (1976) 50 A.L.J.R. 594. Kovacs (1985) 8 U.N.S.W.L.J. 21, 38 to 39, expresses the view that paragraph (ca)(i) is constitutionally very unsafe when it is read against a background of the Marriage Act Case (Attorney-General (Vic.) v. Commonwealth (1962) 107 C.L.R. 529) and Russell:Farrelly (1976) 50 A.L.J.R. 594.
  52. For example, see Tansell v. Tansell (1977) F.L.C. 90-280 at 76 495 and 76 502 to 76 503 (High Court).
  53. Tansell (1977) F.L.C. 90-307 (Full Court).
  54. (1985) F.L.C. 91-610.
  55. Asche and Barblett SJJ. and Murray J.
  56. (1976) F.L.C. 90-079.
  57. (1976) F.L.C. 90-133.
  58. (1985) F.L.C. 91-610. The action should have been brought before the W.A. Supreme Court.

59. (1985) F.L.C. 91-612.
60. Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606 was relied upon. Note, however, that it is arguable that the Family Court's accrued jurisdiction could be a means of solving this problem: see Part A of this chapter. It was not available to the Court in B and B (1985) F.L.C. 91-610 for there was no continuing federal matter to which the non-federal matter could append.
61. CCH Australian Family Law and Practice Reporter (ed. Broun and Fowler, 1976 - 1986), para. 37-505.
62. See the discussion on the finality of s.79 orders, because of the operation of s.81 and the limited operation of s.79A, in Chapter Five under the respective headings in the chapter.
63. As to the law relating to the recognition of the validity of a foreign divorce, see Espie (1983) F.L.C. 91-347. For the application of paragraph (ca)(iii), see Family Law and Practice Reporter (ed. Broun and Fowler 1976-1986), paragraph 37-508.
64. Proceedings falling within paragraphs (ca)(ii) and (ca)(iii) have been expressly excluded from this provision by s.79(1B)(a), (b) and (c).
65. S.79(5) was considered in Martin (1986) F.L.C. 91-737 (Full Court) in the context of a superannuation entitlement.
66. Note that the English Law Commission in Report No. 25, Report on Financial Provision in Matrimonial Proceedings, concluded that a clear distinction should be drawn between the powers of a court prior to breakdown of marriage and its additional powers thereafter. (Paras. 52 to 59, page 27.) Up to breakdown of marriage, what is needed is simply the power to determine the rights to individual items of property. A breakdown of what is required is an overall review and, if necessary, adjustment in the light of new circumstances. It is submitted that the insertion of s.79(5) and s.79(7) by the Family Law Amendment Act 1983 makes allowance for this distinction.
67. Australian Family Property Law (1984), 394.
68. See also the view of Hon. Mr. Justice Strauss Q.C. ((1984) 58 L.I.J. 1452, 1452) that the practical significance of the amendment is that parties who wish to separate, or have separated, can institute proceedings for a division or settlement of property although the time for institution of divorce proceedings has not arrived.
69. s.43(e).
70. (1972) Current Legal Problems 84, 94 (regarding the Matrimonial Proceedings and Property Act 1970 (Eng.)).
71. The contrary view states that the availability of proceedings for the hearing of property disputes prior to actual breakdown conflicts with the avowed aims of divorce legislation to promote reconciliation between the parties wherever this is possible: Law Comm. No. 25 (Eng.) Report on Financial Provision in Matrimonial Proceedings, para. 54.
72. That is by "Sieling injunctions" and "Stowe orders": Sieling (1979) F.L.C. 90-627; Stowe (1981) F.L.C. 91-027. See Chapter 5 for details.
73. Although the basis of jurisdiction in such cases will alter from (ca)(i) to (ca)(ii), they will still be the same proceedings: CCH Australian Family Law and Practice Reporter

- (1976 - 1986) para. 37-512 (Note, however, that amendment of the original application would be necessary if additional relief were sought after a divorce).
74. (1976) F.L.C. 90-132, 75 635 to 75 636.
  75. (1976) F.L.C. 90-079. See also Fisher (1986) F.L.C. 91-701 per Fogarty J.
  76. Farr (1976) F.L.C. 90-132 at 75 636.
  77. Emphasis added.
  78. Chapman v. Chapman (1983) F.L.C. 91-357 (Proceedings by the husband to enforce an agreement (collateral to a s.87 agreement) by the wife to indemnify him with respect to a debt owed by him to a third party were not a "matrimonial cause" under the terms of the Family Law Act prior to amendment.)
  79. See Chapter Six, Part D for the position regarding the recovery of debts between spouses.
  80. It would also enable the speedy distribution of household goods and chattels (Kovacs (1980) 6 Uni Tas L.R. 227 at 256) and prevent parties from solving the problems of their ownership by means of brawn and a truck.
  81. Mr. R.W. Gee, Barrister-at-Law, in his submission to the Joint Select Committee (Evidence, Vol. 17, 3.7.1979 at 5303) referred to the need for a party to be afforded immediate relief in such a situation.
  82. See Issues Paper (No. 6), January 1985, 23-27 passim.
  83. (1984) 4 Fam. L.R. 124.
  84. Re Pile's Caveat (1981) Qd. R. 81; Dembitzer v. Mills (1980) 6 Fam. L.R. 305; Butt (1980) 54 A.L.R. 166. Note, however, that in Heath; Westpac Banking Corporation (1984) F.L.C. 91-362, the defective caveat placed on the title to the property by the wife prevented the husband's mortgage from being registered by the bank.
  85. (1979) F.L.C. 90-627 at 78 264.
  86. Paragraph 164.
  87. It was anticipated that the 1983 amendment would lead to a substantial but temporary increase in property applications in the first part of 1984 (Family Law Council Annual Report, 1983-4, 59) but the reports of cases decided fails to bear out this claim. Law Commission Report No. 25 (Eng) Report on Financial Provision in Matrimonial Proceedings: Proceedings under s.17 Married Women's Property Act 1882 are rarely commenced unless parties are separated or are about to separate (para. 54).
  88. (1982) F.L.C. 91-212.
  89. Hardingham and Neave. Australian Family Property Law (1984), 280 to 281.
  90. (1982) F.L.C. 91-212.
  91. With the enactment of s.79(8) by the Family Law Amendment Act 1983, pending proceedings will not abate on the death of a party. Therefore, State Testator's Family Maintenance jurisdiction will be excluded as between the surviving party and the estate of the deceased party: s.8(1)(a) of the Family Law Act 1975 (Note that Bailey has some doubts about the probable relationship of proceedings under s.79(8) and the State Acts: (1984) 57 A.L.J. 369 at 378). For an analysis of the effects of s.79(8), see Wade Property Division upon Marriage Breakdown (1984), 92 to 96.
  92. Wade, ibid., 72 et seq., suggests a scale of meanings to the phrase "arising out of the marital relationship".

93. (1976) 50 A.L.J.R. 594.
94. See preceding section of this chapter.
95. (1976) F.L.C. 90-110.
96. OCH Australian Family Law and Practice (1976-1986), para. 37 507.
97. See Chapter 3.
98. Matrimonial Property: Where Do We Go From Here? (1971), 38.
99. See Chapter 3 and the authorities there stated.
1. OCH Australian Family Law and Practice Reporter (ed. Brown and Fowler, 1976-1986) para. 37-507.
2. Ibid.
3. (1986) F.L.C. 91-701 (Full Court).
4. See, especially, Re Dovey; ex parte Ross (1979) F.L.C. 90-616; Cullen (1980) F.L.C. 90-899; Stowe (1981) F.L.C. 91-027; Savage and Hodgson (1982) F.L.C. 91-281, (but note that these decisions related to s.4(1)(e), "circumstances arising out of the marital relationship").
5. (1986) F.L.C. 91-720.
6. See Mills (1976) F.L.C. 90-079, where an application for an injunction to restrain one spouse from removing soil from land commonly-owned by the spouses was refused.
7. Sieling (1979) F.L.C. 90-627; Stowe (1981) F.L.C. 90-027 at 76 274.
8. See Report of the Joint Select Committee on the Family Law Act (1981) Vol. 1, paras, 2.28-2.31; 2.43-244. See also Family Law Council Report 1981-2, para.165.

## PART C:

9. (1980) 11 Fed. L.R. 40, 40.
10. By s.8.
11. Hinchen v. Hinchen and Anor (1984) F.L.C. 91-514, e.g. illustrates the complications that can arise in determining whether or not a proceeding constitutes a "matrimonial cause" and it gives an indication of the legal costs which may be involved in a dispute over jurisdiction. See, particularly, 79 176 per Mahoney J.A. See also Prince (1984) F.L.C. 91-501, (Full Court; Evatt C.J. would have given the Family Court jurisdiction to hear the s.79 application before the company's claim to an indemnity of \$9,500,000 was heard by the Supreme Court of Queensland).
12. By proclamation of Dec. 11th., 1975. The Commonwealth Parliament's power to confer exclusive jurisdiction in matrimonial causes on the Family Court derives from s.77(ii) of the Constitution.
13. Kovacs (1983) 13 Fed. L.R. 201 at 203.
14. Property Division upon Divorce (1982), 10.
15. Such uncertainty is deplorable when one considers that the Supreme Court may not agree with the Family Court's conclusion concerning the ownership of property as between the spouses and other, third persons. For example, see Gillies (1981) F.L.C. 91-054; Anderson (1981) F.L.C. 91-104. See Wade Property Division upon Divorce (1982), 71 et seq.
16. Supreme Courts were reluctant to exercise this option prior to the 1983 amendments where parties were not able to take property proceedings.



17. This is quite possible where partnership assets are concerned or where there is an application for the severance of a joint tenancy or the winding up of a company. Note that there might well be a difference in result since the Supreme Court cannot exercise a discretionary jurisdiction, unlike the Family Court.
18. Cacek v. Cacek (1979) F.L.C. 90-637 (Victorian Supreme Court).
19. Reynolds v. Reynolds (1979) 90-728 and Williams v. Williams (1979) 90-640. These decisions were discussed by Cohen J. in Hanset Pty. Ltd. v. Hannes (1984) F.L.C. 91-557 (Supreme Court of N.S.W., Equity Division). His Honour refused to grant a stay of Supreme Court proceedings regarding the company's application for the withdrawal of a caveat placed by the wife on the former matrimonial home, a company asset. He made an analysis of the principles to be applied when forum conveniens arose as an issue.
20. (1983) 13 F.L.R. 201, 216.
21. Kovacs (1983) 13 F.L.R. 201, 216.
22. See Rumble (1980) 11 F.L.R. 40.
23. (1937) 58 C.L.R. 618 at 630.
24. Clark v. Kerr (1955) 94 C.L.R. 489, 505.
25. Brisbane Licensing Court (Ex parte Daniell) (1920) 28 C.L.R. 23; Clyde Engineering Co. v. Cowburn (1926) 37 C.L.R. 466.
26. Colvin v. Bradley Brothers Pty. Ltd. (1943) 68 C.L.R. 151; O'Sullivan v. Noarlunga Meat Ltd. (1954) 92 C.L.R. 565.
27. Ex parte Mclean (1930) 43 C.L.R. 427, 483, per Dixon J.
28. Smith (1984) F.L.C. 91-525 at 79 236 per Evatt C.J. See also Kovacs (1983) 13 Fed. L.R. 201, 205.
29. Smith, ibid. In Smith, s.109 of the Constitution was held not to operate in the circumstances and each party thus retained rights against the other party's estate under the Family Provision Act (1982) (N.S.W.), notwithstanding the approval of a maintenance agreement under s.87 of the Family Law Act.
30. Ibid.
31. Note Butler J.'s neat evasion of the question of inconsistency in Wingate and Towns (1979) F.L.C. 90-624.
32. (1979) F.L.C. 90-728.
33. (1978) F.L.C. 90-502, 77 630.
34. (1977) F.L.C. 90-280, 76 506.
35. (1977) F.L.C. 90-280.
36. On appeal, the Full Court of the Supreme Court of South Australia decided to cede jurisdiction to the Family Court: Tansell v. Tansell (1977) F.L.C. 90-307.
37. (1976) F.L.C. 90-079.
38. (1980) F.L.C. 90-877.
39. Both these cases concerned an application for an injunction under s.4(1)(e).
40. (1964) 110 C.L.R. 353.
41. (1978) F.L.C. 90-515.
42. (1981) F.L.C. 91-087.
43. According to s.44(3) of the Family Law Act as amended in 1983, proceedings with relation to property (not being proceedings under s.78 or s.79A) shall not be instituted except by leave of the court in which the proceedings are to be instituted after expiration of 12 months after the date on which a decree nisi became absolute or a decree of nullity was made. By amendment of s.161 of the Marriage Act 1958 (Vic.) by the

- Marriage Amendment Act 1977, the Victorian legislature provided that where it is likely that proceedings for dissolution of marriage will shortly be taken by either party under the Family Law Act 1975, the court exercising State jurisdiction has power to adjourn the proceedings pending the institution of matrimonial proceedings. The impact of the section has been lessened, however, by the insertion of para. (ca)(i) in s.4(1) by the 1983 amendments to the federal Act.
44. (1979) F.L.C. 90-606 at 78 104.
  45. (1981) F.L.C. 91-087. Wade in Property Division upon Marriage Breakdown (1984), 76, asks whether compliance with the first arm of this test alone, namely establishing a "causal connection" between the divorce and the property proceedings, creates a sufficient jurisdictional relationship between the property proceedings and the divorce so that on this broad causal connection test alone, the Family Court could assume jurisdiction both under paragraphs (ca)(i) and (ca)(ii) of the definition of "matrimonial cause" in s.4(1).
  46. (1977) F.L.C. 90-280 at 76 506.
  47. (1977) F.L.C. 90-280, 76 493 (relying on Vic. v. Cth. (1937) 58 C.L.R. 618).
  48. Rumble (1980) 11 Fed. L.R. 40 offers an analysis of the nature of inconsistency, but see Murray-Jones (1979) 10 Fed. L.R. 25 for a different view.
  49. (1982) F.L.C. 91-274; (1982) 44 A.L.R. 225; (1982) 57 A.L.J.R. 144.
  50. (1982) 44 A.L.R. 225, 232. (Emphasis added).
  51. (1979) F.L.C. 90-280.
  52. (1982) 44 A.L.R. 225.
  53. (1983) 13 Fed. L.R. 201, 208.
  54. This was the ratio decidendi of D.M.W. v. C.G.W. (1982) 44 A.L.R. 225.
  55. Regarding this, see the obiter statement of Gibbs CJ. in D.M.W., ibid.
  56. (1983) 13 Fed. L.R. 201, 208.
  57. Ibid., 213.
  58. (1984) F.L.C. 91-573 at 79 633.
  59. (1981) A.T.P.R. 40-234 at 43 128 to 43 129.
  60. (1984) F.L.C. 91-573 at 79 638.
  61. Note the decision in Stowe (1981) F.L.C. 91-027, where the Full Court held that the fact that the wife had a remedy available to her as to her property claim under State law was not a reason for refusing her application for an injunction to protect her inchoate rights under federal law.
  62. For the limits on the Family Court's accrued jurisdiction, see Part A of Chapter Four.
  63. Kovacs (1983) 13 Fed. L.R. 201, 209.
  64. A comparison of the approach taken by Menhennit J. in Cacek v. Cacek (1979) 90-637 with that of Nygh J. in Baba and Jarvinen (1980) F.L.C. 90-882 illustrates this point. See also Prince (1984) F.L.C. 91-501 and Kovacs (1983) 13 F.L.R. 201, 206.

## CHAPTER FIVE

### PART A:

1. Under s.46, jurisdiction of a magistrate's court can be avoided in respect of property exceeding \$1,000 in value by a party choosing to remove the matter to the Family Court. Wade comments on claims that sometimes matrimonial fault is considered by magistrates to be relevant: Property Distribution upon Marriage Breakdown (1984), 260. However, the truth or otherwise of this statement is difficult to ascertain since no systematic study of the attitudes of magistrates in Australia has been made. In Tasmania, at least, reporting of magistrates' decisions is sporadic and unsystematic. (Compare the English situation where Barrington Baker *et al* conducted a comprehensive survey of the attitudes of registrars exercising jurisdiction over matrimonial matters: The Matrimonial Jurisdiction of Registrars (S.S.R.C., 1977)).
2. Published in the Australian Government Gazette, No. G22, 1st June 1976.
3. McKay (1984) F.L.C. 91-573 at 79 630 per Strauss J.
4. Compare the Federal Court of Australia. Under the Federal Court of Australia Act 1976, it is a court of superior record and a court of law and equity.
5. For the meaning of "matters" in s.31(1)(a), see McKay (1984) F.L.C. 91-573 at 79 633 to 79 634 per Strauss J. and 79 638 to 79 639 per Nygh J.
6. R. v. Federal Court of Australia; ex parte W.A. National Football League (1979) 143 C.L.R. 190.
7. Re Watson; ex parte Armstrong (1976) F.L.C. 90-059; Re Cook; ex parte Twigg (1980) F.L.C. 90-859. See Re Ross-Jones and Marinovich; ex parte Green (1984) F.L.C. 91-555 at 79 483 per Gibbs CJ. for details of the writ and the exceptions that apply.
8. Re Cook; ex parte Twigg, *ibid.*, 75 467 to 75 468; Re Ross-Jones and Marinovich; ex parte Green, *ibid.*, 79 483 per Gibbs CJ.
9. Mooney v. Commissioner of Taxation (1905) 3 C.L.R. 221, 236; R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow and Co. (1910) 11 C.L.R. 1, 21.
10. Chief Justice Evatt and Asche, Pawley, Simpson, Fogarty and Nygh JJ.
11. Comment (1984) 6 Law Society Bulletin (No. 2) 3 at 4.
12. For example, by Broun (1981) 55 A.L.J. 424; Scutt and Graham For Richer, for Poorer (1984), 38 et seq.
13. (1984) F.L.C. 91-507. It is interesting to note that no substantial support for a property regime based on a strict rule of equal property division on divorce has emerged from the public response to the Australian Law Reform Commission's Discussion Paper No. 22, Matrimonial Property Law: (1985) Reform 134, 135.
14. (1986) F.L.C. 91-712.
15. *Ibid.*, 75 175.
16. (1984) 15 F.L.R. 76, 79. See also Scottish Law Commission Family Law on Aliment and Family Provision (1981), paras. 3.37 and 3.58.

17. Recommended by the Report of the Joint Select Committee on the Family Law Act (1980), Vol. 1, para. 7.39.
18. As to this, it is interesting to note that the Family Law Council in its Report to the Attorney General on Administration of Family Law in Australia, tabled in Federal Parliament on 28th March 1985, recommended that since work in the Family Court is arduous and repetitious and as Judges now hold dual commissions, attention should be given to means by which Judges may sit in other jurisdictions, and that Judges should have both the time and the opportunity to familiarise themselves with the non-legal aspects of family law: Watt (1985) 20 Aust. Law Notes 28, 29 (paras. 17 and 19).
19. See further Chapter Six, Part A.

#### PART B:

20. See Nygh J. in Dupont (No. 3) (1981) F.L.C. 91-103 at 76 765; Wardman and Hudson (1978) F.L.C. 90-466 at 77 385; Rolfe (1979) F.L.C. 90-629 at 78 273; Crawford (1979) F.L.C. 90-647 at 78 410 and 78 411.
21. In certain circumstances, a remedy provided by the Supreme Court may prove advantageous to one party but detrimental to the other. See Chapter Four.
22. For the jurisdiction of the Family Court over an intervener, see Ascot Investments Pty. Ltd. v. Harper and Harper (1981) F.L.C. 91-000 at 76 063 per Gibbs J. (with whom Stephen, Aickin and Wilson JJ. agreed).
23. See below, under the heading "Section 85" for the reference to Anderson (1981) F.L.C. 91-104 and the use of the High Court Rules as a means of joinder.
24. McKay (1984) F.L.C. 91-573 at 79 635 per Strauss J. As to the circumstances, see below, particularly Chapter Six, Part F.
25. See Chapter Four, Part A, for an analysis of the Family Court's accrued jurisdiction and its potential for deciding "non-federal" matters and also for an analysis of its associated jurisdiction.
26. For the purposes of the remainder of this study, the amendment to paragraph (ca) will be presumed to be constitutional. See Chapter Four, Part B, for an analysis of the amendment.
27. That does not mean simply that both the husband and the wife must be joined as parties to the litigation but that the dispute must at least originate as one of the significant issues between the husband and the wife, whether they are ultimately contested or not. See Fountain v. Alexander (1982) F.L.C. 91-218 at 77 185 to 77 186 per Gibbs CJ. in relation to the previous similar wording of the definition relating to proceedings as to the custody of children.
28. See Ramsay (No. 2) (1983) F.L.C. 91-323.
29. The phrase "in relation to" was defined in Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606 at 78 103 (High Court).
30. See Barriga (No. 2) (1981) F.L.C. 91-088; Mustafa (1981) F.L.C. 91-112; Dornom (1984) F.L.C. 91-556.
31. This amendment to the Act overcomes the difficulties presented by Peters (1982) F.L.C. 91-202, but compare Rspie (1983) F.L.C. 91-347.
32. (1976) F.L.C. 90-076.
33. (1978) F.L.C. 90-522.

34. Authorities also vary as to whether sums of money owed one spouse by the other may be recovered under s.78. See Chapter Six, Part C.
35. Decisions such as McDougall (1976) F.L.C. 90-076 and Vance (1978) F.L.C. 90-522 make it clear that the approach of the Family Court to the interpretation to s.78 is similar to the approach of the State Supreme Courts to the interpretation of s.17.
36. Prince (1984) F.L.C. 91-501 (Full Court); Holley (1982) F.L.C. 91-257.
37. Macpherson and Clarke (1978) F.L.C. 90-466; Antmann (1980) F.L.C. 90-908 at 75 746 (Full Court).
38. Ibid.
39. See also Anderson (1981) F.L.C. 91-104 (Full Court).
40. (1984) F.L.C. 91-051.
41. For example, Paul v. Constance (1977) 1 W.L.R. 527; Ogilvie v. Ryan (1976) 2 N.S.W.R. 182; Horton v. Public Trustee (1977) 1 N.S.W.L.R. 182.
42. Re Solomon, A Bankrupt (1976) Ch. 573; Re Turner, A Bankrupt (1974) 1 W.L.R. 556.
43. For example, McMahon v. McMahon (1979) V.R. 239; Ioppolo v. Ioppolo (1978) 4 Fam. L.R. 124.
44. Gee J. obiter in D and D (S.85 Application) (1984) F.L.C. 91-593 expresses the view that a broad view of "property" such as that taken in Duff (1977) F.L.C. 90-217 would encompass a chose in action for debt and would enable s.78 to be used to recover such a debt. (Contrast Slattery (1976) F.L.C. 90-110, where no consideration was given to the relevance of s.78.)
45. Antmann (1980) F.L.C. 90-908; Gillies (1981) F.L.C. 91-054; af Petersens (1981) F.L.C. 91-905.
46. The Family Law Council of Australia proposed that the period be extended to three years, but the Family Law Council opposed the amendment: Family Law Council Report 1981-2, 57.
47. For the application of s.44(3), see Hamilton (1984) F.L.C. 91-358.
48. As, for example, in Grist v. Grist (1979) F.L.C. 90-683.
49. Murray J. in Pearce (1982) F.L.C. 91-276 at 77 570 recognised this. See also Whitford (1979) F.L.C. 90-612 at 78 145 (Full Court).
50. Garside (1978) F.L.C. 90-488 illustrates the relationship between s.78 and s.79.
51. For the circumstances where to do so is desirable, see Wade Property Division upon Divorce (1982), 5.
52. (1979) F.L.C. 90-709.
53. Australian Family Property Law (1984), 285.
54. Ibid., 310.
55. Note that s.79(9), inserted in 1983, makes conferences with a Registrar compulsory, except in exceptional circumstances. As to this, see Waters (1984) 6 Law Soc. Bull. (No. 4.) 4, 5; Watt (1985) 20 Aust. Law News 28, 32.
56. For example, Antmann (1980) F.L.C. 90-908; W. (1980) F.L.C. 90-872; Tuck (1981) F.L.C. 91-021, especially at 76 219 (Full Court); Morris (1982) F.L.C. 91-271 at 77 519; Marinko (1983) F.L.C. 91-307. In Norbis v. Norbis (1986) F.L.C. 91-712, the High Court held that either the global approach or the asset-by-asset approach to the appropriate division of assets is capable of producing a just and equitable order.

57. However, this section does not "....confer upon the Court any power to make orders otherwise than under... s.79". (Slattery (1976) F.L.C. 90-110 at 75 511 (Full Court). See also Apathy (1977) F.L.C. 90-250; Dench (1978) F.L.C. 90-469. (Contra: McDougall (1976) F.L.C. 90-076.)
58. For example, see Re Densham, A Bankrupt (1975) 3 All E.R. 726; Brown v. Wylie (1980) 6 Fam. L.R. 519. See also Donaldson v. Freeson (1934) 51 C.L.R. 598, where the rights of a stranger were also in issue.
59. Re Dovey; ex parte Ross (1979) F.L.C. 90-616; Ascot Investments (1981) F.L.C. 91-000.
60. Anderson (1981) F.L.C. 91-104; W. (1980) F.L.C. 90-238.
61. Krotofil (1980) F.L.C. 90-909.
62. Branchflower (1980) F.L.C. 90-857; Egan (1985) F.L.C. 91-608.
63. Note Clifton v. Lodge (1982) A.C.L.D. 292: Holland J. granted the father relief in the equity jurisdiction because it was unlikely that he would be granted leave to intervene in s.79 proceedings.
64. This prevents applications to the Court by third parties for the recovery of all manner of household debts. The English Court of Appeal in Tebbutt v. Haynes and Others (1981) 2 All E.R. 238 took the view that the Court had the right to determine the rights and interests of third parties who intervened in property proceedings for it was fundamental to the exercise of jurisdiction under s.24 of the Matrimonial Causes Act 1973 (Eng.) that a Judge should know over what property he was entitled to exercise his discretion. If there was a dispute between a respondent spouse and a third party as to ownership of the property, that dispute had to be resolved before an effective s.24 order could be made.
65. Ascot Investments (1981) F.L.C. 91-000 at 76 061 per Gibbs CJ.
66. See Chapter Six, Part F.
67. Re Dovey; ex parte Ross (1979) F.L.C. 90-616 at 78 191 to 78 192 (Gibbs J.)
68. For the Family Court's accrued jurisdiction and the possible extent to which it can be used to decide matters concerning third parties, and also its associated jurisdiction under s.33, see Chapter Four, Part A.
69. (1984) F.L.C. 91-501.
70. (1984) F.L.C. 91-501 at 79 079.
71. Pawley J., ibid., at 79 078 referred to the fact that the exercise of the accrued jurisdiction is entirely discretionary.
72. Ibid., at 79 078.
73. Note that in Anderson (1981) F.L.C. 91-110, third parties were involved directly as parties to the dispute because the wife alleged that false transfers of property had been executed by her husband to his brothers.
74. (1984) F.L.C. 91-501.
75. These tests were stated by Mason, Murphy, Brennan and Deane JJ. in Fencott v. Muller (1983) 57 A.L.J.R. 313, 317.
76. Felton v. Milligan (1971) 124 C.L.R. 367, 373, per Barwick CJ. See also Philip Morris Inc. v. Adam P. Brown Male Fashions (1981) 33 A.L.R. 465, 512.
77. Ramsey (No. 2) (1983) F.L.C. 91-323: the husband's contribution after the decree absolute had been granted and the parties had resumed cohabitation was recognised as having earned him an equitable interest.

78. For details of the application of s.79(4)(a), see Hardingham and Neave Australian Family Property Law (1984), 311 to 313.
  79. As to this, see CCH Australian Family Law and Practice Reporter (Ed. Brown and Fowler), para. 38-214.
  80. Ramsey v. Ramsey (1978) F.L.C. 90-449.
  81. Freeman (1979) F.L.C. 90-697; de Mooy (1978) F.L.C. 90-411.
  82. (1977) F.L.C. 90-256. In White (1982) F.L.C. 91-246, the Full Court treated a forgiven debt as a contribution. In Hamilton (1984) F.L.C. 91-358, it was left to the Supreme Court to determine the effectiveness of a purported gift of property.
  83. (1980) F.L.C. 90-908 at 75 745.
  84. W. (1980) F.L.C. 90-872 at 75 527.
  85. The position is otherwise if one party has dissipated or disposed of the asset. For details, see Chapter Six.
  86. Hardingham and Neave Australian Family Property Law (1984), 316.
  87. Williams v. Williams (1985) F.L.C. 91-628 (High Court).
  88. Note that the homemaker roles of the husband and wife are neither stereotyped nor mutually exclusive. Also, since s.79(4)(c) contains both a material and a non-material component, it is analogous to the division between "services and society" in the consortium action in tort: Bailey (1980) 54 A.L.J. 190, 195.
  89. See, for example, Robinson v. Robinson (1961) W.A.R. 56.
  90. For Richer, for Poorer (1984), 77.
  91. They give the decisions in Richards (1976) F.L.C. 90-037 and Geyl (1978) 7 Fam. L.R. 219, 223, as examples.
  92. As to this, see Wade (1985) 15 Fed.L.R. 76, 84.
  93. Summary of Discussion Paper No. 22 (June, 1985), paragraph 11.
  94. (1979) F.L.C. 90-647.
  95. See also Noel (1981) F.L.C. 91-035 at 76 321; Murkin (1980) F.L.C. 90-806.
  96. (1979) F.L.C. 90-677. For similar decisions, see Lucas v. Lucas (1982) 26 R.F.L. (2d.) 253 and Helstein v. Helstein (1980) 12 R.F.L. (2d.) 273, both decisions of the Alberta Queen's Bench.
  97. (1976) F.L.C. 90-072.
  98. See also Burdon and Nikou (1977) F.L.C. 90-293 at 76 557; Sheedy (1979) F.L.C. 90-719.
  99. It should be noted that only 34% of Australian women work outside the home if they have children aged 0 to 4 years whereas the proportion of working women with school age or older children is 55%: Australian Institute of Family Studies Newsletter, No. 16, August 1986, 5.
1. S.79(2). See, particularly, Mahon (1982) F.L.C. 81-242; Mallet v. Mallet (1984) F.L.C. 91-507 (High Court).
  2. See, particularly, Rolfe (1979) F.L.C. 90-629 at 78 272; Wardman and Hudson (1978) F.L.C. 90-466 at 77 384; Crawford (1979) F.L.C. 90-647 at 78 410 to 78 411; Potthoff (1978) F.L.C. 90-475 at 77 446; Albany (1980) F.L.C. 90-905 at 75 720; Noel (1981) F.L.C. 91-035 at 76 320; Zdravkovic (1982) F.L.C. 91-220; Parker (1983) F.L.C. 91-364 at 78 446.
  3. Settling Up (ed. McDonald, 1986), 229.
  4. (1984) F.L.C. 91-507. See also Norbis v. Norbis (1986) F.L.C. 91-712.
  5. Professor Hambly, Chairman of the Matrimonial Property Inquiry, in a statement to The Age (4th May 1984, page 13), expressed the view that the immediate effect of the decision

- might be ".... to discourage appeals from decisions of individual judges, by emphasising the breadth of their discretion".
6. See, for example, (1984) F.L.C. 91-507 at 79 111 per Gibbs CJ.
  7. Bailey (1980) 54 A.L.J. 190, 195, and Goodman (1981) Aust. J. Social Issues 175, 185, and (1982) Fed. L.R. 131, 148, comment on the problems inherent in the "equality perspective".
  8. Deane J. dissented, seeing the starting point as a ".... general counsel of experience" only.
  9. (1984) F.L.C. 91-507 at 79 129, borrowing from Lord Tennyson's poem "Aylmer's Field".
  10. Australian Family Property Law (1984), 326.
  11. (1984) F.L.C. 91-507 at 79 119; see also Gibbs CJ at 79 111; Wilson J. at 79 126. See Bates (1986) Conv. and P. Lawyer 19 for an analysis of the judgments.
  12. Ibid., 79 120.
  13. Ibid.
  14. (1984) F.L.C. 91-527 at 79 279.
  15. (1984) F.L.C. 91-507.
  16. Wilson (1980) F.L.C. 90-880; Albany (1980) F.L.C. 90-905 at 75 721; Tuck (1981) F.L.C. 91-021.
  17. The content of the sub-section is well summarised in Soblusky (1976) F.L.C. 90-124 at 75 580. Goodman (1982) 13 Fed. L.R. 131, 136 et seq., also analyses it.
  18. (1967) 116 C.L.R. 366. See particularly 379 et seq.
  19. In New Zealand, however, an adjustment on the basis of special needs is precluded because of the fixed rules of equal division laid down by the Matrimonial Property Act 1976 (N.Z.).
  20. Dench (1978) F.L.C. 90-469.
  21. Anast and Anastopoulos (1982) F.L.C. 91-201.
  22. Morris (1982) F.L.C. 91-271 at 77 519 per Evatt CJ. See also Kelly (No. 2) (1981) F.L.C. 91-108 at 76 808. In the latter case, the Full Court differentiated between "property" and "financial resources".
  23. Analysed by Nygh J. in Aroney (1979) F.L.C. 90-709 at 78 790.
  24. See especially Aroney, ibid. at 78 785.
  25. (1978) F.L.C. 90-500 at 77 605.
  26. (1979) F.L.C. 90-709 at 78 790.
  27. See also W. (1980) F.L.C. 90-872; Woolley (No. 2) (1981) F.L.C. 91-011; Stowe (1981) F.L.C. 91-027 at 76 262; Anast and Anastopoulos (1982) F.L.C. 91-201 at 77 061; Morris (1982) F.L.C. 91-271.
  28. For the interpretation of this definition, see Duff (1977) F.L.C. 90-127 at 76 127, 76 133. The definition echoes that in the English legislation: Bates (1978) 8 Fam.Law 24, 24. In White (1979) F.L.C. 90-682, a vested interest in an estate, even though postponed during a life interest, was held to be "property" within the ambit of s.79.
  29. Bailey (1980) 54 A.L.J. 190. Compare the position in New Zealand, where the legislation recognises three kinds of property, and where problems have arisen as a result: Goodman (1982) 13 Fed. L.R. 131, 134 to 135.
  30. Carter (1981) F.L.C. 91-061 (relied on by Nygh J. in Zdravkovic (1982) F.L.C. 91-220 at 77 207). See Goodman (1982) 13 F.L.R. 131, 137.
  31. Miller (1984) F.L.C. 91-542.



32. Currie (1976) F.L.C. 90-101; Miller (1977) F.L.C. 90-326; Ferguson (1978) F.L.C. 90-500 at 77 615; Aroney (1979) F.L.C. 90-709 at 78 784 to 78 785; W. (1980) 90-872 at 75 528; Garrett (1984) F.L.C. 91-539.
33. (1979) F.L.C. 90-647.
34. Compare the wife's grazing property in W. (1980) F.L.C. 90-872 at 75 527.
35. (1979) F.L.C. 90-647. See further Wade Property Division upon Marriage Breakdown (1984), 213 to 215.
36. Norbis v. Norbis (1986) F.L.C. 91-712.
37. Response to the A.L.R.C.'s Discussion Paper No. 22, Matrimonial Property Law, indicates that there is widespread difficulty in obtaining adequate information about a spouse's business assets: (1985) Reform 134, 136. See also Settling Up (ed. McDonald. 1986), 218, 221.
38. As in McIntosh v. McIntosh (1985) 46 R.F.L. (2d.) 249; Reid v. Reid (1979) 1 N.Z.L.R. 572. Also discussed in Y. v. Y. (1977) 2 N.Z.L.R. 385.
39. As in Tuck (1981) F.L.C. 91-021, where both were pharmacists, and Underwood (1981) F.L.C. 91-020, where for 46 years the wife had laboured on the orchard.
40. Aroney (1979) F.L.C. 90-709; Albany (1980) 90-905; Woodham (1984) F.L.C. 91-547.
41. Scott (1977) F.L.C. 90-251; Hayne (1977) F.L.C. 90-265.
42. (1980) F.L.C. 90-885.
43. Ibid., 75 591. See also Scott (1977) F.L.C. 90-251 at 76 353 (Demack J.).
44. Part B.
45. Kelly (No. 2) (1981) F.L.C. 91-108 (Full Court). As to the manipulation of assets, see Chapter Six, Part F.
46. (1977) F.L.C. 90-216 at 76 126. See also Martin (1986) F.L.C. 91-706.
47. (1977) F.L.C. 90-217.
48. (1835) 5 L.J. Ch. 90.
49. A claim for damages is not property "in possession or reversion": Palmer (1985) F.L.C. 91-606 (husband had a common law claim for personal injuries).
50. For example, Kelly (No. 2) (1981) F.L.C. 91-108 at 76 802.
51. Woodham (1984) F.L.C. 91-547.
52. For example, Bailey (1978) F.L.C. 90-424; Richardson (1979) 90-603; Crapp (1978) F.L.C. 90-460 at 78 181; Walters (1986) F.L.C. 91-733 (Full Court). Compare Woolley (No. 2) (1981) F.L.C. 90-011 at 76 318 (husband was held to have a vested interest in that particular superannuation scheme). In a recent case, Prestwich (1985) F.L.C. 91-569, the Full Court held that there is no decided policy as to the appropriate division of superannuation benefits. See generally Hardingham and Baxt Discretionary Trusts (1975); Tahminjis (1981) 7 Uni. Tas. L.R. 191.
53. OCH Australian Family Law and Practice Reporter (ed. Broun and Fowler, 1976-1986), para. 16-010. The Australian Law Reform Commission has emphasised the fact that, in many marriages, the husband's income-earning potential is the major asset, whereas the wife's income-earning capacity is often reduced by the marriage.
54. Richardson (1979) F.L.C. 90-603; Whitehead (1979) F.L.C. 90-673.
55. Woodham (1984) F.L.C. 91-547.

56. See note 52, supra.
57. Whitehead (1979) F.L.C. 90-673.
58. Lange and Moores (1979) F.L.C. 90-651 at 78 430.
59. Garrett (1981) F.L.C. 91-539.
60. Aroney (1979) F.L.C. 90-709 at 78 786; Tiley (1980) F.L.C. 90-898.
61. For example, see Scott (1977) F.L.C. 90-251; Elias (1977) F.L.C. 90-267. See also Goodman (1982) 13 Fed. L.R. 131, 132 et seq.
62. Elias, ibid.
63. Bailey (1980) 54 A.L.J. 190, 197, outlines a number of fact situations and the solutions arrived at by the courts. The Ontario Law Reform Commission believed that "the matrimonial home must be made the subject of a special treatment corresponding to its special position as a major asset, a basic family shelter, and a focal point of family activity": Report on Family Law, Part IV: Family Property Law (1974), 53.
64. (1981) F.L.C. 91-021.
65. Taking Rights Seriously (1977), 31 to 39 and 68 to 71. For an analysis of discretion as used in family litigation, see Finlay (1976) 2 Monash L.R. 221. See also the judgment of Brennan J. in Norbis v. Norbis (1986) F.L.C. 91-712.
66. See, for example, the judgment of Strauss J. in Ferguson (1978) F.L.C. 90-500 at 77 613; Mallet v. Mallet (1984) F.L.C. 91-507 at 79 125 (Wilson J.); Norbis v. Norbis (1986) F.L.C. 91-712, particularly the judgments of Mason and Deane JJ. and Brennan J. For an apt description of the type of discretion exercised by Judges of the Family Court, see Cardozo, The Nature of the Judicial Process (1963), 141.
67. Currie (1976) F.L.C. 90-101; McDougall (1976) F.L.C. 90-076.
68. Authorities for this proposition will appear in Chapter Six, Part A.
69. Stowe (1981) F.L.C. 91-027 at 76 273 (Full Court). See also Collins (1977) F.L.C. 90-286; Kaljo (1978) F.L.C. 90-445.
70. Garrett (1984) F.L.C. 91-539 (Full Court). See also Carter (1981) F.L.C. 91-061; Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606 at 78 104 per Gibbs CJ. For the procedure to be followed in a case where parties resumed cohabitation after a s.79 order and one party earned an equitable interest in property subsequent to that order, see Ramsay (1983) F.L.C. 91-301 (Full Court) and Ramsay (No. 2) (1983) F.L.C. 91-323 (re-hearing by Nygh J.)
71. See Chapter Six, Part F. Contrast the position under the Matrimonial Property Act 1980 (Alberta). In Burger v. Burger (1986) 48 R.F.L. (2d.) 158, the Court was unable to remedy the situation where the husband's debts, incurred through the dissipation of assets in the separation period, exceeded the value of his remaining property. The Court had no jurisdiction to award damages for the deficiency to the wife.
72. Tye (No. 2) (1976) F.L.C. 90-048; Woodham (1984) F.L.C. 91-547.
73. For example, Crapp (1979) F.L.C. 90-615; Murkin (1980) F.L.C. 90-806; Public Trustee (S.A.) and Keays (1986) F.L.C. 91-651.
74. This paragraph was considered by the Full Court in Martin (1986) F.L.C. 91-737 (superannuation entitlement).
75. Finnis v. Finnis (1978) F.L.C. 90-437; White (1979) F.L.C. 90-682 (although this adjournment was reversed on appeal for different reasons) and Murkin (1980) F.L.C. 90-806. These

cases were decided before the insertion of s.79(5) by the 1983 amendments. Note that s.79(5) is merely an enabling section: OCH Australian Family Law and Practice Reporter (ed. Broun and Fowler, 1976 - 1986) para. 36-955. For the position regarding the sequestration of a bankrupt's estate before the hearing of an application under s.79, see Chapter Six, Part F.

76. (1985) 48 M.L.R. 44, 59.
77. Woolley (No. 2) (1981) F.L.C. 91-011 at 76 136 per Nygh J.
78. See generally Kelly (1981) F.L.C. 91-033.
79. (1976) F.L.C. 90 056 at 72 232. See also Ripper (1977) F.L.C. 90-228.
80. By s.84, the Court may order the execution of instruments by a court officer where a party has refused or neglected to comply with its directions.
81. S.83 is far less stringent than s.79A, despite the 1983 amendments to the section. S.83 is useful in times of recession and spiralling inflation where a change to a party's financial circumstances is usually inevitable.
82. S.79(5) was considered by the Full Court in Martin (1986) F.L.C. 91-737 (superannuation entitlement).
83. As to this, see Wade Property Division upon Marriage Breakdown (1984), 281.
84. See generally Wade, ibid., 301 et seq.; Hardingham and Neave Australian Family Property Law (1984), 408 et seq.
85. Smith (1984) F.L.C. 91-525 at 79 243 (Full Court).
86. Prior to the amendment, the Court could not alter the substantive parts of an order: Molier and Van Wyk (1980) F.L.C. 90-911; Holland (1982) F.L.C. 91-243; Ravasini (1983) F.L.C. 91-312. The operation of s.79A(1)(b) is analysed by Gee J. in Rohde (1984) F.L.C. 91-592.
87. Taylor v. Taylor (1979) F.L.C. 90-674 (High Court).
88. This was anticipated in Kokl (1981) F.L.C. 91-078 by Gee J.
89. Hardingham and Neave Australian Family Property Law (1984), 409.
90. Some of the respondents to the Australian Institute of Family Studies' survey of divorced couples reported that they had been subjected to physical abuse or blackmail: for example, see Settling Up (ed. McDonald, 1986), 221.
91. For example, Vergis v. Vergis (1977) F.L.C. 90-275 at 76 470 to 76 471.
92. Taylor v. Taylor (1979) F.L.C. 90-674 at 78 590 per Gibbs J.
93. Ibid. at 78 599 per Aickin J.
94. (1984) F.L.C. 91-555.
95. (1984) F.L.C. 91-555 at 79 487.
96. As in Wilson v. Wilson (1967) 10 F.L.R. 203; Williamson v. Williamson (1974) 24 F.L.R. 226.
97. For example, Oliver v. Oliver (1978) F.L.C. 90-482 (Husband's non-disclosure of a \$6,000 account did not influence the proprietary of the agreed property division); Wright (1979) F.L.C. 90-221 at 76 147 (There is a "broad area of what might be considered a just and equitable settlement": Asche J.).
98. (1974) 24 F.L.R. 226, 228. See also Holland (1982) F.L.C. 91-243.
99. For comment on undue influence in family business dealings, see (1985) 129 S.J., 211 and 234.
1. Wbley and McMullen (1979) F.L.C. 90-619; Backhouse v. Backhouse (1978) 1 W.L.R. 243.
2. Cresswell v. Potter (1978) 1 W.L.R. 255n.

3. Snell Principles of Equity (27th. ed., 1973), 549. See O'Brien (1981) F.L.C. 91-094.
4. Fry v. Lane (1888) 40 Ch.D. 312, 322, per Kay J. See generally Meagher, Gummow and Lehane Equity (1977), Ch. 16.
5. (1978) 1 W.L.R. 255n.
6. In Backhouse v. Backhouse (1978) 1 W.L.R. 243 at 251 to 251, Balcombe J. suggested that courts should not encourage transfers of property, unaccompanied by legal advice, as between husband and wife soon after breakdown of their marriage.
7. Cresswell v. Potter (1978) 1 W.L.R. 255n., 260. As to consent orders made within the provisions of s.79, see Smith (1984) F.L.C. 91-512 (Full Court).
8. (1889) 14 App. Cas. 337, 374.
9. Note the fine line between "mere" negligence and recklessness: C.B.C. of Sydney v. R.H. Brown and Co. (1971) 126 C.L.R. 337 (High Court).
10. (1983) F.L.C. 91-365.
11. See Wade Property Division upon Marriage Breakdown (1984), 461.
12. (1983) F.L.C. 91-365.
13. See Wade Property Division upon Divorce (1982), 262.
14. (1985) 1. All E.R. 106.
15. (1986) F.L.C. 91-713.
16. Regarding evidence of financial circumstances, see Serisier and Duff Australian Family Law Forms and Precedents (1986). See also (1986) 21 Law News 38.
17. (1980) F.L.C. 90-820 (Concerned a consent to marriage).
18. In Woolley (No. 2) (1981) F.L.C. 91-011, Nygh J. set down the pre-requisites.
19. As in S. (1980) F.L.C. 90-820.
20. (1981) F.L.C. 91-078 at 76 557.
21. On the necessary degree of materiality of a particular act of duress, see Barton v. Armstrong (1976) A.C. 104. One respondent to the Australian Institute of Family Studies' survey of divorced couples reported being subjected to blackmail: Settling Up (ed. McDonald, 1986), 221.
22. Hardingham and Neave Australian Family Property Law (1984), 412.
23. (1976) F.L.C. 90-124.
24. (1979) F.L.C. 90-674.
25. While the High Court was considering s.79A in its un-amended form, it is submitted that the interpretation remains the same.
26. (1967) 10 F.L.R. 203.
27. (1979) F.L.C. 90-674 at 78 595.
28. Ibid., at 78 594 to 78 595.
29. (1977) F.L.C. 90-266.
30. Ibid., at 76 197.
31. See also Kokl (1981) F.L.C. 91-078 at 76 557. This statement considerably enlarges Carmichael J.'s succinct definition in Birbeck v. Birbeck (1970) 16 F.L.R. 78, 92: "To withhold facts is not to reveal them or suppress them".
32. Krebs (1976) F.L.C. 90-117.
33. See, generally, Green and Kwiatek (1982) F.L.C. 91-259.

34. Manitoba legislation provides the means for a party to obtain full disclosure of financial and property matters: see Tutiah v. Tutiah (1986) 48 R.F.L. (2d.) 337 (C.A.) and academic comments by McLeod at the end of head notes.
35. Rohde (1984) F.L.C. 91-592.
36. (1983) F.L.C. 91-365. See O.17, r.2.
37. Act No. 23 of 1979, s.13, effective 5th April, 1979.
38. See Byrne v. Byrne (1965) 7 F.L.R. 342; Gilpin v. Gilpin (1969) 17 F.L.R. 131; Williamson v. Williamson (1974) 24 F.L.R. 226.
39. (1981) F.L.C. 91-078.
40. (1978) F.L.C. 90-414 at 77 103.
41. (1985) F.L.C. 91-610.
42. See Sieling (1979) F.L.C. 90-627 at 78 255 for a comprehensive review of the law relating to ex parte orders.
43. Moore v. Moore (1962) N.S.W.R. 522; Gilpin v. Gilpin (1969) 17 F.L.R. 131; McKenna v. McKenna (1971) 18 F.L.R. 15; Taylor v. Taylor (1979) F.L.C. 90-674.
44. Taylor, ibid. (incompetent lawyers); Cullen (1976) F.L.C. 90-093.
45. Hillman v. Hillman (1977) F.L.C. 90-316 (false evidence as to whereabouts of wife's relatives). See Williamson v. Williamson (1974) 24 F.L.R. 226, 229.
46. McKenna v. McKenna (1971) 18 F.L.R. 15, 18, per Allen J. See also Holland (1982) F.L.C. 91-243 at 77 339 to 77 341.
47. For example, Lui (1985) F.L.C. 91-572. (Husband defaulted in delivering a certificate of title in accordance with a court order.)
48. (1984) F.L.C. 91-545. (Husband sought damages for breach of trust since the wife, acting under an order of the Court to sell the matrimonial home, had sold it at an undervalue.)
49. Ibid. at 79 413.
50. (1976) F.L.C. 90-047.
51. (1978) F.L.C. 90-447.
52. Fogarty J. on this point considered that only half the difference should be deducted.
53. (1978) F.L.C. 90-447 at 77 282. See also Molier and Van Wyk (1980) F.L.C. 90-911.
54. And also (1A) or (1C).
55. For the interpretation of this phrase as it is used in s.85(3), see Heath and Heath; Westpac Banking Corporation (1983) 91-362. Nygh J. pointed out that the degree of protection to be given remains within the discretion of the Court: ibid., 78 427 to 78 430.
56. Remedied, where its provisions are fulfilled, by s.79A(1)(c).
57. Parker v. Arcus and Castiglione (1985) F.L.C. 91-581; Phillips (1985) F.L.C. 91-634.
58. "Act" was substituted for "Part VIII" by the 1983 amendments. Prior to the amendment, proceedings had to fall within the definition of "matrimonial cause" in s. 4(1) of the Act: Whitaker (1980) F.L.C. 90-813 at 75 130 (Nygh J.). A disposition of property made before the coming into operation of the Family Law Act 1975 is not excluded from the Act's ambit: Buckeridge (No. 2) (1981) F.L.C. 91-114 (Full Court).
59. Parker (1983) F.L.C. 91-364 at 78 445 per Nygh J., who differentiates between variation and setting aside of an order under s.85.

60. "Disposition" is defined in s.85(5) as including a sale and a gift. In Bassola (No. 1) (1985) F.L.C. 91-623, it was held to be "any form of alienation" and not limited to mere assignments, sales or gifts of property.
61. Page (1978) F.L.C. 90-525; Rickie (1979) F.L.C. 90-626; Whitaker (1980) F.L.C. 90-813.
62. Whitaker, *ibid.* Hardingam and Neave Australian Family Property Law (1984), 426, fn. 1, express the view that, insofar as Abdullah (1978) F.L.C. 91-003 contradicts this proposition, it was wrongly decided.
63. Wade Property Division upon Divorce (1982), 193.
64. See Chapter Four, Part B.
65. (1981) F.L.C. 91-104. (The wife claimed that signatures on transfers of real estate to third parties had been forged by her husband.)
66. O.16, rr. 4, 7 and 8; s.38(2) of the Family Law Act provides that these may be applied.
67. Yule v. Janek (1978) F.L.C. 90-439 at 77 223; Dowal v. Murray and Anor. (1978) F.L.C. 90-516; Fountain and Anor. v. Alexander and Anor. (1982) F.L.C. 91-218. (All High Court decisions).
68. Under the Matrimonial Causes Act 1959 (Cth.), s.120, subjective intention had to be proved. See Kovacs (1983) 13 Fed. L.R. 563, 564.
69. The Full Court in Heath; Westpac Banking Corporation (1984) F.L.C. 91-517 at 79 194 provided a definition of "likely" which is commensurate with this statement. See also Koufos v. Czarnokow Ltd. (1969) 1 A.C. 350; H. Parsons (Livestock) Ltd. v. Uttley Ingham and Co. Ltd. (1977) 3 W.L.R. 990. Wade Property Division upon Divorce (1982), 198 to 199, suggests tests for the probability of there being proceedings under the Act.
70. Pflugrad (1981) F.L.C. 91-052 at 76 430 *per* Elliott J. (approved by Full Court in Holley (1982) F.L.C. 91-257 at 77 440). See also Menz (1980) F.L.C. 90-852; Cullen (1980) F.L.C. 90-899; Abdullah (1981) F.L.C. 91-003 at 76 084.
71. Ivanfy (1978) F.L.C. 90-512; Buckeridge (No. 2) (1981) F.L.C. 91-114.
72. Ivanfy, *ibid.*; Holley (1982) F.L.C. 91-257.
73. Thompson (1976) F.L.C. 90-115: evidence of propensity to evade or default is necessary before an injunction to restrain spending will be granted.
74. Wade Property Division upon Divorce (1982), 196.
75. Menz (1980) F.L.C. 90-852; Abdullah (1981) F.L.C. 91-003.
76. Badcock (1979) F.L.C. 90-723: wife's transfer to a trustee did not defeat the husband's s.79 claim as the wife still legally controlled the trustee.
77. (1981) F.L.C. 91-000.
78. See, generally, Davern Wright Testator's Family Maintenance in Australia and New Zealand (3rd. ed., 1974); Hardingam, Neave and Ford Wills and Intestacy (1983).
79. For example, Schaefer v. Schuhmann (1972) A.C. 572.
80. Cummins (1977) F.L.C. 90-209.
81. For the effects of s.79(8), see Wade Property Division upon Marriage Breakdown (1984), 92 to 96.
82. Whitaker (1980) F.L.C. 90-813 at 75 129; Holley (1982) F.L.C. 91-257; Heath (1983) F.L.C. 91-362 (Nygh J. at first instance.)

83. (1984) F.L.C. 91-517 at 71 194.
84. Ascot Investments (1981) F.L.C. 91-000.
85. Re Dovey; ex parte Ross (1979) F.L.C. 90-616.
86. For example, Heath; Westpac Banking Corporation (1984) F.L.C. 91-517.
87. Whitaker (1980) F.L.C. 90-813 at 75 130 per Nygh J.; Buckeridge (No. 2) (1981) F.L.C. 91-005.
88. (1983) F.L.C. 91-362 at 78 427.
89. See also Ivanfy (1978) F.L.C. 90-512; Pflugradt (1981) F.L.C. 91-052; Menz (1980) F.L.C. 90-852; Cullen (1980) F.L.C. 90-899.
90. (1975) 1 W.L.R. 1628 at 1637.
91. Alberta legislation expressly provides that a transfer mala fides which reduces the matrimonial assets to the detriment of the other spouse may be taken into account: Shone (1977) 17 Alb. L.R. 143, 176.
92. Includes valuable consideration (Twyne's Case (1602) 3 Co. Rep. 806; 76 E.R. 809; Mathews v. Feaver (1786) 1 Cox. Eq. Cases 278; 29 E.R. 1165; Re David and Adlard (1914) 2 K.B. 694) and marriage (Campion v. Cotton (1810) 17 Ves. 263; 34 E.R. 102; Hardey v. Green (1849) 12 Beav. 182; 50 E.R. 1029) but not consideration of love and affection.
93. In Heath; Westpac Banking Corporation (1983) F.L.C. 91-362, the wife's improper caveat prevented the husband's mortgage from being registered by the bank.
94. Heath, ibid., at 78 427.
95. See Glass J.A. in Benjamin v. Benjamin (1976) 11 A.L.R. 211, 216, in relation to similar wording in s.120(3) of the Matrimonial Causes Act 1959.
96. (1981) F.L.C. 91-003.
97. Such as that in Cullen (1980) F.L.C. 90-899 and Abdullah, ibid.
98. (1983) F.L.C. 91-362.
99. (1980) F.L.C. 90-813 at 75 130.
1. This is the example given in CCH Australian Family Law and Practice Reporter (1976-1986), para. 35 063.
2. (1981) F.L.C. 91-000.
3. Whitaker (1980) F.L.C. 90-813, relying on Ganas v. Ganas (1971) 18 F.L.R. 298.
4. Issues Paper No. 6, Jan. 1985, 27.
5. Davies (1980) F.L.C. 90-868; Milland (1981) F.L.C. 91-065; Holley (1982) F.L.C. 91-257.
6. Wallmann (1982) F.L.C. 91-204.
7. The associated jurisdiction is defined by Nygh J. in Gubbay (1984) F.L.C. 91-545 at 79 414.
8. (1982) F.L.C. 91-241.
9. (1982) F.L.C. 91-204.
10. (1982) F.L.C. 91-241.
11. Ibid., 77 328, per Frederico J. See further Chapter Six, Part F.
12. As in Buckeridge (No. 2) (1981) F.L.C. 91-114; Ivanfy (1978) F.L.C. 90-512.
13. CCH Australian Family Law and Practice Reporter (1976 - 1986), para. 45-045.
14. Szelley and Shelley (1977) F.L.C. 90-323.
15. (1981) F.L.C. 91-003 at 76 086.
16. In Ivanfy (1978) F.L.C. 90-512, an order was made that they be paid into court.

17. As in Ivanfy, ibid.
18. Pflugradt (1981) F.L.C. 91-052.
19. Wilkes (1981) F.L.C. 91-060. (Wife disposed of a caravan prior to the hearing.)
20. For example, Abdullah (1981) F.L.C. 91-003. (Husband's evidence that his property had been lost while gambling not believed).
21. Hardingham and Neave Australian Family Property Law (1984), 368 et seq.
22. For a review of the Court's interpretation of this provision, see Joske Matrimonial Causes and Marriage Law and Practice (5th ed., 1969), 617 et seq.
23. For example, see Hon. Justice Strauss' comments in (1984) 58 L.I.J. 1452.
24. Hardingham and Neave Australian Family Property Law (1984), 369.
25. See Perlman v. Perlman (1984) F.L.C. 91-500.
26. Hardingham and Neave Australian Family Property Law (1984), 370, suggest that the proceedings must constitute a "matrimonial cause" within paragraph (ca) of the definition in s.4(1) and therefore be between the parties to the marriage, but it is submitted that they have overlooked the 1983 amendment to s.31(1).
27. Matrimonial Causes Act 1959 (Cth.), s.86(2); Matrimonial Causes Act 1973 (Eng.).
28. (1929) P. 225, 232 (Hill J.).
29. Prescott v. Fellowes (1958) P. 260.
30. Bosworthwick v. Bosworthwick (1927) P. 24.
31. Miller Family Property and Financial Provision (1974), 202 to 203, cited by Hardingham and Neave Australian Family Property Law (1984), 370.
32. (1960) 160 C.L.R. 170, 174.
33. Prinsep v. Prinsep (1929) P. 225.
34. (1960) P. 201, 210.
35. Meller v. Meller (1967) 10 F.L.R. 12, 14 (Jenkyn J.).
36. Cook v. Cook (1962) P. 325.
37. Hargreaves v. Hargreaves (1926) P. 42; Burnett v. Burnett (1936) P. 1.
38. Young v. Young (1962) P. 27.
39. Marsh v. Marsh (1878) 47 L.J.P. 78; Vallance v. Vallance (1907) 77 L.J.P. 33.
40. Prinsep v. Prinsep (1929) P. 225; General Accident Fire and Life Assurance Corporation Pty. Ltd. v. I.R.C. (1963) 3 All E.R. 259.
41. Ibid.
42. Compton v. Compton (1960) p. 261; Purnell v. Purnell (1961) P. 141.
43. Prinsep v. Prinsep (1929) P. 225.
44. Australian Family Property Law (1984), 372 to 373.
45. Meller v. Meller (1967) 10 F.L.R. 12; see also Whitton v. Whitton (1901) P. 348; Purnell v. Purnell (1961) P. 141.
46. Meller v. Meller, ibid., 18, per Jenkyn J.
47. (1984) F.L.C. 91-555.
48. Kovacs (1985) 59 L.I.J. 296. See also Hardingham and Neave Australian Family Property Law (1984), 373.



49. Note that an injunction cannot be categorised as an exercise of the Court's power in relation to property unless it effects a change of proprietary interests: Mullane v. Mullane (1983) F.L.C. 91-303.
50. Burke Osborn's Concise Law Dictionary (6th. ed., 1976).
51. For the law relating to interlocutory injunctions, see American Cyanamid v. Ethicon Ltd. (1975) A.C. 396 (applied by the Full Court in Smith and Saywell (1980)) F.L.C. 90-856; Stowe (1981) F.L.C. 91-027; Buckeridge (No. 2) (1982) F.L.C. 91-114.
52. See Aldred (1984) F.L.C. 91-510 (Nygh J.).
53. The Supreme Court of Judicature (Consolidation) Act 1925 (Eng.), s. 45(1), provides that mandamus or injunctions are available in any division of the High Court.
54. (1984) F.L.C. 91-555 at 79 487.
55. See also Re Dovey; ex parte Ross (1979) F.L.C. 90-616 at 78 190 to 78 191; Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606 at 78 103.
56. Re Ross-Jones and Marinovich; ex parte Green (1984) F.L.C. 91-555 at 79 487 per Gibbs CJ., with whom Mason and Brennan JJ. agreed. Therefore, for example, powers in the Family Court to punish acts in the nature of contempt must be found in the Act (s. 35, s.108, s.80(d) and s.114(4)).
57. (1979) F.L.C. 90-627 at 78 264. See also J. (1979) F.L.C. 90-718 at 78 871 (Anderson J.).
58. Fedele (1986) F.L.C. 91-744 at 75 431 (with special reference to s.114(1)).
59. For example, see Dean (1977) F.L.C. 90-213 at 76 096; Rowe (1980) F.L.C. 90-895 at 75 643; Page (1981) F.L.C. 91-525 at 76 248. Of course, the very terms of the section exhort Judges exercising jurisdiction under the Act to have regard to the principles.
60. (1977) F.L.C. 90-200 at 76 057 (Full Court). Note that the application of the principle to that case has since been held to be erroneous).
61. (1984) F.L.C. 91-510 at 79 155 (Injunction to restrain dealings with property pending determination of an application under s.44(3)).
62. (1976) F.L.C. 90-115 at 75 524.
63. See Spry The Principles of Equitable Remedies (3rd. ed., 1980), Chapter 4.
64. Regarding applications for injunctions, see Serisier and Duff Australian Family Law Forms and Precedents (1986).
65. Stowe (1981) F.L.C. 91-027. For a close analysis of the reasons for refusal to grant an injunction, see Spry The Principles of Equitable Remedies (3rd. ed., 1980), Chapter 4.
66. See especially Stowe, supra., at 76 260 to 76 261.
67. But note the proviso "other than proceedings under a law of a State or Territory prescribed for the purposes of s.114AB" inserted in 1983. S.114AB preserves the operation of a prescribed law of a State or territory that is capable of operating concurrently with s.114.
68. See, for example, Tansell (1977) F.L.C. 90-307 at 76 633.
69. Farr (1976) F.L.C. 90-133.
70. Dickey Family Law and Property: 3 Essays (McCall, Dickey and Wade, 1980), 55 at 59.

71. See, for example, Davis (1976) F.L.C. 90-062 at 75 308; King (1977) F.L.C. 90-299 at 76 582; Tansell (1977) F.L.C. 90-307 at 76 632, 76 634.
72. McCarney (1977) F.L.C. 90-200 at 76 058; Tansell v. Tansell (1977) F.L.C. 90-280 at 76 495 and especially at 76 502 to 76 503; Sieling (1979) F.L.C. 90-627 at 78 258 to 78 259.
73. The matter of exclusive occupancy is of no relevance to this study. For the law relating to it, see Mullane v. Mullane (1983) F.L.C. 91-303 (High Court).
74. For example, see Rickie (1979) F.L.C. 90-626; Martiniello (1981) F.L.C. 91-050 at 76 419.
75. Page (1978) F.L.C. 90-525, especially at 77 792 and Re Dovey; ex parte Ross (1979) F.L.C. 90-616 at 78 191 to 78 192 (although in the latter case the injunction was allowed to lie to prevent the husband from exercising his voting rights as a shareholder and director of the company so it could sell the matrimonial home.)
76. Australian Family Property Law (1984), 432.
77. As when there is an application for leave to institute proceedings out of time under s.44(3): Aldred (1984) F.L.C. 91-510.
78. Regarding the uncertainties of the application and interpretation of paragraph (ca)(i), see Chapter Four, Part B.
79. Murkin (1980) F.L.C. 90-806 at 75 082.
80. As in Re Dovey; ex parte Ross (1979) F.L.C. 90-616; Stowe (1981) F.L.C. 91-027, where a spouse was restrained from exercising fiduciary powers.
81. The so-called "Mareva injunction" gets its name from Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. (1980) 1 All E.R. 213.
82. Page (1978) F.L.C. 90-525; Rickie (1979) F.L.C. 90-626; Harris (1980) F.L.C. 90-812; Burridge (1980) F.L.C. 90-902. (Contra: Cullen (1980) F.L.C. 90-899; Walker (1977) F.L.C. 90-306. In Cullen, it was suggested that the Court might be able to bind the respondent's agent under s.114(1). See also W. (1982) F.L.C. 91-238.)
83. Howard (1982) F.L.C. 91-279.
84. Kalenjuk (1977) F.L.C. 90-218. (Husband was restrained from selling, disposing of or otherwise dealing with his half-interest in a house notwithstanding that this would affect the ability of the co-owner of the property to deal with his interest in the property.) In Re Dovey; ex parte Ross (1979) F.L.C. 90-616, the High Court took this approach.
85. For example, see Buckeridge (No. 2) (1982) F.L.C. 91-114 at 76 871 (Simpson J.). Note the comment about the High Court's approach in Perlman v. Perlman (1984) F.L.C. 91-500 below.
86. Perlman v. Perlman (1984) F.L.C. 91-500 at 79 056 per Gibbs CJ.; Re Ross Jones and Marinovich; ex parte Green (1984) F.L.C. 91-555 at 79 485 to 79 486 per Gibbs CJ., with whom Mason and Brennan JJ. agreed.
87. For example, McCarney (1977) F.L.C. 90-200 at 76 056, 76 058. For the law relating to enforcement, see Perlman v. Perlman (1984) F.L.C. 91-500.
88. Schmidt (1980) F.L.C. 90-873.
89. Kovacs (1983) 57 L.I.J. 563, 564.
90. For the extent to which it can control third parties, see Chapter Six, Part F.

## CHAPTER SIX

### PART A:

1. Finlay (1978) 94 L.Q.R. 120, 123.
2. Cretney Principles of Family Law (4th ed., 1984), 99 to 103, passim. See also Finlay (1978) 94 L.Q.R. 120, 120 to 125, passim.
3. By c.85 of the Matrimonial Causes Act 1857 (Eng.), an adulteress was absolutely barred from receiving maintenance.
4. The first reported case where this concession was made appears to be Ashcroft v. Ashcroft (1902) P. 270.
5. The tenor of these is reflected in Lord Denning M.R.'s use of the phrase "obvious and gross" in Wachtel v. Wachtel (1973) Fam. 72.
6. Finlay (1978) 98 L.Q.R. 120, 125. As reasons for this, he gives an increasingly secular outlook, more discerning and complex psychological insights into human relationships and the progress of women towards equality. See also Payne (1969) 3 Ottawa L.R. 373, 391.
7. The Commission reported in 1966 in Putting Asunder.
8. In The Grounds for Divorce: The Field of Choice (1966) Comm. 3123.
9. Ibid., para. 15. The Royal Commission on Marriage and Divorce (1956) - the Morton Commission - had discussed irretrievable breakdown as a basis for divorce but all except one member (Lord Walker) favoured the retention of the matrimonial offence principle, and nine were opposed to the introduction of breakdown even as an alternative ground for divorce: see Cretney Principles of Family Law (4th ed., 1984), 103, and authorities there cited.
10. See Thomson (1985) Scots Law Times 29, 33 to 35.
11. Wachtel v. Wachtel (1973) 2 W.L.R. 84, 90 (decision at first instance).
12. See also Cretney Principles of Family Law (4th ed., 1984), 800 to 806; (1985) 14 Aust. Family Physician 434 to 435; 439 to 440; (1985) Reform 122, quoting Professor David Hamblly, Commissioner for the Matrimonial Property Inquiry being conducted by the Australian Law Reform Commission.
13. Neumayer in The Reform of Family Law in Europe (ed. Chloros, 1978), 1 at 6.
14. See McKenna (1970) 30 M.L.R. 121 for the background to the legislation. The spirit of the Act has been retained by its successors in legislation.
15. Criticised by Finlay (1975) 38 M.L.R. 153, 153 to 155. See Putting Asunder (1966), para. 9: fault and breakdown grounds are incompatible. Cretney Principles of Family Law (4th ed. 1984), 214, 216 to 217 claims that the fault concept is still significant in English law.
16. The Report of the Joint Select Committee on the Family Law Act (1980), Vol. 1, 42, recommended that this not be changed and the Commonwealth Parliament itself, on a bipartism basis, re-affirmed the policy in 1983. As to the Act's effect on the divorce rate, see Carmichael "Australian Divorce Rates: is a Real Decline at Hand?" in Making Marriage and Family Work (Report of National Conference 1986 University of Melbourne, Vic. Marriage Institute), 63. See also McDonald A.I.F.S. Newsletter No. 16, August 1986, 19.

17. For a recent interpretation of s.48, see Batty (1986) F.L.C. 91-703. S.104 of the Act provides for the recognition of foreign divorces. The Hague Convention on the Recognition of Divorces and Legal Separations expressly provides that findings of fault do not apply to the recognition of divorce, so that accession to the Convention by the Australian Government is consonant with the general provisions of the Act and their judicial interpretation. For comment, see (1984) 58 A.L.J. 128 and McClean Recognition of Family Judgments in the Commonwealth (1983), 73 to 83.
18. Settling Up (ed. McDonald, 1986) 6.
19. Finlay (1978) 94 L.Q.R. 120, 132. As to whether fault is nevertheless covertly taken into consideration by the courts, or is a matter taken into account when financial matters are settled by consent or as the result of an agreement worked out with a Registrar, little is known: Chislm and Jessep (1981) 4 U.N.S.W.L.J. 43, 44. Baxter (1975) 25 Uni. Toronto L.J. 239, 260, claims that fault considerations are present in latent form. A survey conducted by the Wolfson College, Oxford, in 1977 suggests that this is so: Barrington Baker et al. The Matrimonial Jurisdiction of Registrars: The Exercise of the Matrimonial Jurisdiction by Registrars in England and Wales (C.S.S.S. 1977).
20. Page (1986) Australian Family Lawyer 11.
21. Ibid.
22. Ibid.
23. For example, see A.L.R.C. Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 50. The English Law Commission has reported a similar attitude: Law Commission Report No. 112, para. 37.
24. Harrison in Settling Up (ed. McDonald, 1986), 241 at 257. See also Page (1985) Australian Family Lawyer 11.
25. (1985) Aust. Law News, 20, 21.
26. Ibid.
27. Ibid. See also comments by Professor Lauchlan Chipman which were reported in (1985) Reform 121, 121 to 122.
28. Family Law in Australia: A Report of the Joint Select Committee on the Family Law Act, Vol. 1 (1980), para. 5.45. See Harrison (1980) 5 Legal Services Bulletin 247, 248. Note that a minority report of the Committee opposed the recommendation.
29. Commonwealth of Australia Parliamentary Debates (Senate) (13th October 1981), 1107. This stance was later supported by the then Attorney-General, Senator Gareth Evans: Parliamentary Debates (Senate) (8th September, 1983), 555.
30. The words underlined show the proposed change to the wording of s.75(2)(o).
31. A.L.R.C. Discussion Paper No. 22 Matrimonial Property Law, para. 50.
32. The symposium was chaired by Treyvaud J.
33. Institute of Family Studies (now "Australian Institute of Family Studies") Newsletter No. 11, December 1984, 19.
34. (1985) Reform 122. It should be noted that Page has argued strenuously for the re-introduction of fault considerations in order to bring the legal system into step with public opinion: (1985) Australian Family Lawyer 11.
35. Discussion Paper No. 22, para. 50.

36. The then Attorney-General, Senator Lionel Murphy, in his Second Reading Speech introducing the Family Law Bill in 1974, stated that the philosophical basis of the new law was the belief that ".... an inquiry into the cause of breakdown was not proper": Finlay (1978) 94 L.Q.R. 120, 130.
37. See also a report on comments of Professor Hambly, Commissioner for the A.L.R.C. Matrimonial Property Inquiry, which were made to the Second National Conference of the Australian Association of Marriage and Family Counsellors in (1985) Reform 122. In its report, A Better Way Out, the Family Law Sub-Committee of the Law Society (U.K.), January 1979, makes a similar statement.
38. Prinsall (1981) 47 Brooklyn L.R. 667,81. It should be noted that marital fault has been expressly excluded from consideration in maintenance and property awards in 18 States, included as a discretionary factor in 15 States and omitted from statutory mention in another 10 States: Freed and Foster (1983) 16 Fam. L.Q. 289, 322 to 323.
39. It has already been noted that a recommendation by the Joint Select Committee that this be amended to take account of the respondent's conduct has not been implemented. See also Chisolm and Jessep (1981) 4 U.N.S.W.L.J. 43,66.
40. See Lown and Bendiak (1979) 17 Alberta L.R. 372, 393, for academic comment on the relevance of conduct per se.
41. For example, see Richards (1976) F.L.C. 90-037 at 75 142 (Full Court); Willett (1976) F.L.C. 90-022; Petterd (1976) F.L.C. 90-065; McLeod and Somlo (1976) F.L.C. 90-073; Zappacosta (1976) F.L.C. 90-089; Rainbird (1977) F.L.C. 90-256. Contrast Issom (1977) F.L.C. 90-238 (maintenance denied because the wife's behaviour was "obvious and gross"; criticised by Chisolm and Jessep (1981) 4 U.N.S.W.L.J. 43, 54) and note obiter dicta by Nygh J. in Eliades (1981) F.L.C. 91-022 (also a claim for maintenance; his Honour suggested that it was arguable that, if an applicant for maintenance deliberately engages in conduct by which she deprives herself of her husband's financial support, it may be necessary to take that conduct into account.) See also Gates v. Gates (1976) 1 Fam. L.R. 11,452 (husband's desertion regarded as relevant to a property application. The decision was held by the Full Court in Wells (1978-79) 4 Fam.L.R. 57 to be incorrect.) Compare McLeod and Somlo (1976) F.L.C. 90-073 (wife's association with another man of "some financial substance" whom she would soon marry was relevant, not because of her conduct per se, but because the association brought financial implications. Note, however, that conduct has been considered relevant in Married Women's Property decisions; see Cracknell v. Cracknell (1971) 3 W.L.R. 490 and comment in Leibrandt (1976) F.L.C. 90-058 at 75 260.
42. Gray Property Reallocation on Divorce (1976), 266.
43. (1976) F.L.C. 90-124.
44. See Soblusky, *ibid.*, at 75 568 to 75 569 for a summary of the principles that the Full Court felt to be relevant to a maintenance application, but note Chisolm and Jessep (1981) 4 U.N.S.W.L.J. 43, 50, for a criticism of their approach.
45. (1978) F.L.C. 90-500. See also Burdon and Nikou (1977) F.L.C. 90-293, where Marshall SJ. at 76 557 said, "It is not difficult to envisage settlement of property applications in

- which the contribution of a party in the capacity of homemaker and parent could be in issue and involve consideration of conduct of a 'fault' nature".
46. Ferguson (1978) F.L.C. 90-500 at 77 606 per Watson and Wood SJJ.
  47. The Full Court recognised this in Wells (1978-9) Fam. L.R. 57 at 61 (Watson SJ., Lusink and Gun JJ.)
  48. For a brief analysis of the English law of divorce, see Weitzman in The Resolution of Family Conflict (ed. Eekelaar and Katz, 1984), 461, 463 to 464. See also Cretney Principles of Family Law (4th ed., 1984) 214, 216 to 217, for the continued significance of fault.
  49. Gray Reallocation of Property on Divorce (1976), 266. Of course, he recommends the introduction of a regime of joint ownership of "matrimonial property" whereas no such regime of matrimonial property exists in Australia, nor does it exist in England. The New Zealand legislature has recognised that matrimonial misconduct should "not be taken into account to diminish or detract from the positive contribution .... unless the misconduct has been gross and palpable and has significantly affected the extent or value of the matrimonial property": s.18(3) Matrimonial Property Act 1976 (N.Z.). The section was interpreted by Jeffries J. in Hackett v. Hackett (1977) 2 N.Z.L.R. 429, 433.
  50. The Australian Law Reform Commission recommends that the present system of taking into account only that conduct which affects property or finances be continued: Summary of Discussion Paper No. 22 (June 1985), para. 7.
  51. This was recognised by the Scottish Law reform Commission in Family Law: Report on Aliment and Financial Provision (Report No. 67 of 1981 at para. 3.186). For details, see Deech (1982) 98 L.Q.R. 621, 652 to 655.
  52. Ibid. The Scots would be prepared to look at the conduct of an application for maintenance as well: ibid. This was the approach taken by Fogarty J. in Issom (1977) F.L.C. 90-328. Compare the position under Testator's Family Maintenance legislation where conduct is to be taken into account: see Smith (1984) F.L.C. 91-525 at 79 244 (Nyggh J.)
  53. It should be noted, however, that McDonald and Weston, in a paper, "The Data Base for Child Support Reform", presented to the Workshop in Child Support Issues, Social Justice Project, Australian National University, Canberra, 1986, reported that figures for September 1982 show that only 36% of divorced women and 20% of re-married women with the care of children from a former marriage were receiving regular maintenance payments: Harrison and Tucker in Settling Up (ed. McDonald 1986), 259 at 260. For a general survey of maintenance arrangements, see Harrison and Tucker, ibid., 259 to 267.
  54. (1976) F.L.C. 90-216 at 76 125.
  55. Note that Mr. Lionel Bowen, M.H.R. on 19th October 1983 (Weekly Hansard, No. 11, 1983, page 171) stated during the Second Reading Debate on the Family Law Amendment Bill 1981: "I am satisfied that the courts are interpreting the matter (the extent to which conduct should be relevant) to mean economic circumstances." The relevance of conduct having economic consequences has been specifically recognised by legislation in other jurisdictions. See, generally, Kovacs (1980) 6 Uni. Tas. L.R. 227, 253. For the Canadian position,

- see McLean (1981) 31 Uni. Toronto L.R. 363, 373 and 424. For the attitude of New Zealand courts to such conduct, see Atkin (1979) 10 V.U.W.L.R. 93, 112 to 113. For the American position, see Freed and Foster (1973) 7 Fam. L.Q. 275, 280 to 343.
56. (1981) 28 U.C.L.A.L.R. 1181, 1186.
  57. Property Division upon Divorce (1982), 120.
  58. In W. (1980) F.L.C. 90-872 at 75 526, Nygh J. held that a wife was not a failure for keeping the husband's legal practice out of the home.
  59. Professor Hambly, Commissioner for the Australian Law Reform Commission's Matrimonial Property Inquiry, commented on this in a speech he made to the Second National Conference of the Australian Association of Marriage and Family Counsellors: (1985) Reform 121, 122.
  60. Note that by s.101 of the Family Law Act, the asking of an "offensive" or "scandalous" question is prohibited unless the Court is satisfied that it is in the interests of justice that the question be answered. Costs will also be awarded where unreasonable behaviour has led to unnecessary legal costs on the part of the other: see further Part D of this chapter.
  61. Wade Property Division upon Divorce (1982), 181. See Hewitt (1977) 42 Sask L.R. 260, 267 for the Canadian perspective.
  62. (1986) F.L.C. 91-712.
  63. For comment, see Family Law: Report on Aliment and Financial Provision Scot. Law Commission No. 67, para. 3.37.
  64. The fettering of this broad discretion has been disapproved by judges of high authority. For example, see Mallet v. Mallet (1984) F.L.C. 91-507 at 79 110. See generally Evans v. Bartlam (1937) A.C. 473 at 488 to 489; Gardner v. Jay (1885) 29 Ch.D. 50, 58. The Australian Law Reform Commission has suggested the enactment of guidelines to counter the uncertain effect of the judicial discretion extended under the present form of the Family Law Act: Discussion Paper No. 22 Matrimonial Property Law (June 1985), paras. 150, 151, to 159.

#### PART B:

65. (1976) 2 N.Z.L.R. 715 (P.C.) at 728. His Lordship was interpreting s.18 of the Matrimonial Property Act 1963 (N.Z.) which referred to contributions to the marriage partnership.
66. (1978) F.L.C. 90-500 at 77 606. See also Burdon and Nikou (1977) F.L.C. 90-293 at 76 557 (Marshall S.J.). In Ferguson (1978) F.L.C. 90-500, Watson and Wood S.J.J. were prepared to apply the principles set down in s.43 to such a case but Strauss J. at 77 612 said that, in his view, s.43 does not appear to apply to "matters" in the sense of s.75(2)(o) ".... but to principles to which regard must be had in the exercise of the Court's jurisdiction in accordance with the provisions of the Act". Therefore, justification for taking into account matrimonial conduct as such either under s.75(2)(o) or s.79(2) did not come from s.43. It is submitted that this is the correct approach.
67. See, for example, Richards (1976) F.L.C. 90-307 at 75 412 (Full Court); L. (1978) F.L.C. 90-493 at 77 556 per Wood S.J.
68. (1978) M.P.C. 134, 134.
69. Cunningham v. Cunningham (1985) 45 R.F.L. (2d.) 395, 398.

70. (1976) F.L.C. 90-072. Compare Crowdis v. Crowdis (1982) 25 R.F.L. (2d.) 353: husband continued to make a real financial contribution to the family despite his alcoholism.
71. Presumably, if she is to be considered to have earned an interest in assets built up during the marriage. Of course, their assessment involves a value judgment.
72. As to the difficulties involved in making these, see Wade Property Division upon Marriage Breakdown (1984), 168 to 173; A.L.R.C. Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 36.
73. (1980) F.L.C. 90-909.
74. (1983) F.L.C. 91-354. See also Anderson v. Anderson (1985) 45 R.F.L. (2d.) 457 and Morrison v. Morrison (1985) 45 R.F.L. (2d.) 249.
75. (1981) F.L.C. 91-053.
76. Ibid. at 76 435 (Full Court - Asche and Emery SJJ., Bulley J.)
77. Ibid. at 76 436. A similar approach was taken in Mead (1983) F.L.C. 91-354 (Asche SJ.) and O'Dea (1980) F.L.C. 90-896 (Murray J.).
78. Mead (1983) F.L.C. 91-354.
79. For a similar approach, see Bryant v. Bryant (1973) S.J. 911 (affirmed (1976) S.J. 165.)
80. (1978) F.L.C. 90-443 at 77 262.
81. Yet in that case, the wife claimed that the husband's original contribution to the matrimonial home's purchase was a mere \$800 and that thereafter, through drink, unemployment and indifference, he made little contribution to the rate payments, let alone the mortgage repayments.
82. (1978) F.L.C. 90-493 at 77 556.
83. As to this, see Martin v. Martin (1976) 3 All E.R. 625 per Cairns L.J. "Dissipation" is defined in the matrimonial property legislation of the Canadian Province of Manitoba as "the jeopardising of the financial security of a household by gross and irresponsible squandering of an asset": McLean (1981) Uni. Toronto L.R. 363 at 373. For an analysis of the distinction between negligence and recklessness, see Part C of this chapter.
84. For example, see Mead (1983) F.L.C. 91-354.
85. Lown and Bendiak (1979) 17 Alberta L.R. 372 comment on the need for a court to distinguish between normal and abnormal risks, however.
86. Of course, taking a chance on a lottery would not amount to reckless squandering of money unless a large sum of money were invested.
87. Abdullah (1981) F.L.C. 91-003.
88. Wilkes (1981) F.L.C. 91-060. (This case, however, concerned the disposition of a caravan by the wife prior to the hearing.)
89. For example, Gerszt (1979) F.L.C. 90-641 (maintenance claim. Family Court held to have no jurisdiction to decide dispute over ownership of lottery winnings); Mackie (1981) F.L.C. 91-069 (husband's win after separation was a windfall and not a joint matrimonial asset.) See also O'Riordan v. O'Riordan (1985) 46 R.F.L. (2d.) 180.
90. (1981) F.L.C. 91-093.
91. (1982) F.L.C. 91-257 at 77 438.
92. (1983) F.L.C. 91-322.



93. (1967) 1 N.S.W.L.R. 284. For Canadian decisions of a similar nature, see Wilson v. Wilson (1981) 10 R.F.L. (2d.) 331 and Beebakhee v. Beebakhee (1985) 46 R.F.L. (2d.) 13.
  94. For a definition of reckless conduct, see Part C of this chapter.
  95. Compare Dow-Sainter (1980) F.L.C. 90-890 (Full Court): no importance was laid on the fact that the husband had expended \$43,500 between May 1977 and August 1978 on his own pleasures. Note Rainbird (1977) F.L.C. 90-256: Wood J. acceded to the wife's request that no money be settled on the younger daughter because of her fear that the man with whom she was living would dissipate it.
  96. (1976) 3 All E.R. 625 at 629.
  97. Eliades (1981) F.L.C. 91-022 at 76 232 per Nygh J.
  98. Kimber (1981) F.L.C. 91-085 (Full Court). The wife had assisted in operating the business "both by actual work connected with it and assuming homemaker's responsibilities above the ordinary which enabled the husband to operate the cabs for long and inconvenient hours" (at 76 585).
  99. For example, Hovey v. Hovey (1985) 42 R.F.L. (2d.) 23: money deposited in parties' joint bank account but used for husband's business purposes.
1. A.L.R.C. Discussion Paper No. 22 Matrimonial Property Law (June 1985) paragraph 194, passim, and authorities there cited.
  2. Mahon (1982) F.L.C. 91-242.
  3. For an assessment of the Court's treatment of the "homemaker contribution", see Bailey (1980) 54 A.L.J. 190, 195 to 196. For the difficulties in defining the juristic basis on which recognition of domestic contribution is founded, see Shone (1970) 17 Alberta L.R. 143 at 170 to 171. See also comments, together with authorities, in Chapter Three of this study. The Morton Commission (Royal Commission on Marriage and Divorce, which reported in 1956) gave as one of its reasons for rejecting the introduction of a community of property system to England the fact that great injustice would result if a lazy spouse could claim automatically a share in the product of the other's thrift.
  4. (1983) F.L.C. 91-364 at 71 365.
  5. It appears that contributions under s.79(4)(c) are not detracted from because of the employment of cleaners, gardeners, etc.: Aroney (1979) F.L.C. 90-709; W. (1980) F.L.C. 90-872.
  6. Gray Reallocation of Property on Divorce (1977), 39, refers to the "affectional dimension" of the housewife's domestic activity. At 41, he gives examples propounded by feminists as to this sexual division of labour and then he refutes them at 41 to 42.
  7. Mallet v. Mallet (1984) F.L.C. 91-507 at 79 126 per Wilson J.
  8. Mallet v. Mallet (1984) 91-507 at 79 126 per Wilson J.. Scutt (1983) 57 A.L.J. 143, 153, refers to decisions in which the wife's homemaking abilities were assessed (Richards (1976) F.L.C. 90-037: wife's performance as homemaker adjudged to be unsatisfactory because of her interest in various outside activities; Mapstone (1979) F.L.C. 90-681; Albany (1980) F.L.C. 90-905) and she points out that "..... (s)ince there is no clearly ascertainable record of non-financial contribution, women are vulnerable to the personal standards that judges

- hold as to what is 'good' or 'proper' for the housewife and her family". As an example, she cites Geyl (1978) 7 Fam. L.R. 219. At first instance, the wife was left with 3/14 of property built up during the marriage because her performance as a wife was unsatisfactory, according to the presiding judge. In a Canadian decision, Hill v. Hill (1985) 44 R.F.L. (2d.) 225, the fact that the wife had used income from her hairdressing business to satisfy personal and family needs was allowed to counterbalance her minimal domestic contribution.
9. Mallet v. Mallet (1984) F.L.C. 91-507 per Gibbs CJ. at 79 111, per Mason J. at 79 119 and per Wilson J. at 79 126.
  10. Bailey (1980) 54 A.L.J. 190, 195. The Saskatchewan Queen's bench in Robinson v. Robinson (1982) 28 R.F.L. (2d.) 342 found that the marital relationship had been meaningless to the wife for she had abdicated her "marital duties". See also Kozak v. Kozak (1975) 22 R.F.L. (2d.) 371 (Manitoba Q.B.)
  11. Hewitt (1977) 42 Sask. L.R. 260, 261. She makes the point that undoubtedly some decisions would have been more favourable to the spouse homemaker had her conduct been better. See also Baxter (1975) 25 Uni. Toronto L.J. 236, 260.
  12. For Richer, for Poorer (1984), 139.
  13. While Cairns LJ. in Martin v. Martin (1976) 3 All E.R. 625 said that adultery is irrelevant to the quantification of maintenance and property orders in the English jurisdiction, other English decisions show that this is not in fact the case: see, for example, Cuzner v. Underdown (1974) 1 W.L.R. 641 per Davies L.J. at 645. It was also relevant to maintenance applications under s.86 of the Matrimonial Causes Act 1959. See, for example, Sawlutschynski v. Sawlutschynski (1964) W.A.R. 160, 162.
  14. Atkin (1979) 10 V.U.W.L.R. 93, 105, also favours taking this into account. Of course, after separation and/or divorce, the husband may enter a de facto relationship. In this case, the financial implications of this liaison will be taken into consideration under the provisions of s.75(2) (m) and (o) in proceedings in relation to the property and maintenance of the parties.
  15. (1979) F.L.C. 90-719.
  16. The case was decided prior to the 1983 amendments, so Nygh J. was referring to the then s.79(4)(b) in his judgment. As to the reasons behind the amendment, see Bailey (1980) 54 A.L.J. 190, 195.
  17. For the opposite view, see Lown and Bendiak (1979) 12 Alberta L.R. 372, 393.
  18. Sheedy (1979) F.L.C. 90-719 at 78 872.
  19. Richards (1976) F.L.C. 90-037.
  20. Ibid. at 75 141. Contrast Rishel v. Rishel (1981) 19 R.F.L. (2d.) 221: wife's poor housekeeping was irrelevant as it had not affected the parties' financial standing.
  21. Commonwealth of Australia Parliamentary Debates (Session 1973), Senate, Vol. S.58, page 2831.
  22. (1976) F.L.C. 90-124 at 75 581. The case concerned a maintenance claim but "property" was expressly included. While the decision has been criticised by Chisolm and Jessep (1981) 4 U.N.S.W.L.J. 43, 49 to 51, with respect to contribution it is unexceptionable.
  23. (1981) F.L.C. 91-034 at 76 315.

24. Therefore, in Quinn (1979) F.L.C. 90-677 at 78 617 (the case concerned a marriage of very short duration), Asche SJ. attached little significance to the wife's domestic contribution.
25. (1981) F.L.C. 91-085.
26. (1979) F.L.C. 90-079.
27. (1980) F.L.C. 90-872.
28. The property order in Noel (1981) F.L.C. 91-035 (Full Court) was augmented to take into account contribution as a homemaker and parent of an exceptional standard. However, the Court has not gone so far as to doubly compensate a woman who is in employment but is at the same time a homemaker (Bailey (1980) 54 A.L.J. 190, 195; Fineman (1983) Wisconsin L.R. 789 at 862 to 863) nor is there a rule that a husband obtains extra credit for helping with the domestic chores even if he is the sole breadwinner: Zdravkovic (1982) F.L.C. 91-220. Compensation is not the underlying rationale of Part VIII of the Family Law Act. Entitlement to an order pursuant to s.79 is based on "contribution" and "needs". If it were otherwise, a spouse could be "compensated" for the loss of the breadwinner or for a similar reason.
29. Powell v. Powell (1978) F.L.C. 90-443 at 77 262 per Cross AJ.
30. Ibid.
31. It was so considered in Mahon (1982) F.L.C. 91-242.
32. (1984) F.L.C. 91-507 at 79 126. For further comment on the quantification of domestic contribution, see Chapter Three, Part A, paragraph (d) of this study.
33. (1984) 15 F.L.R. 76, 84. See further Chapter Three, Part A, paragraph (d) of this study.
34. It can be said of all the categories of negative contribution mentioned in this chapter that value judgments and evidentiary complexities are necessary in any assessment of a spouse's defective contribution.
35. (1984) F.L.C. 91-507 at 79 120. As a first stage in the allocation of property on breakdown of marriage, the Australian Law Reform Commission suggests that once the pool of property available for division has been identified, it ought to be divided by reference to the spouses' "contributions to the marriage partnership" on the basis of a presumption of equality: Discussion Paper No. 22 Matrimonial Property Law (June 1985), paragraph 198. See also para. 115 to 116, 151 to 152.
36. Settling Up (ed. McDonald, 1986), 66. See also 67.
37. (1984) F.L.C. 91-507 at 79 120.
38. (1976) F.L.C. 90-124 at 75 581.
39. For example, Wardman and Hudson (1978) F.L.C. 90-466; Potthoff (1978) F.L.C. 90-475; Zdravkovic (1982) F.L.C. 91-220; Racine and Hemmett (1982) F.L.C. 91-277. Page (1986) Australian Family Lawyer 11 argues that Mallet's Case opens the door to a qualitative analysis of each party's contributions during marriage and he gives reasons why this should be so.
40. (1981) 4 U.N.S.W.L.J. 43, 61.
41. Lown and Bendiak (1979) 17 Alberta L.R. 372, 393.
42. For example, Weber v. Weber (1976) F.L.C. 90-072; Burdon and Nikou (1977) F.L.C. 90-293 at 76 557; Sheedy (1979) F.L.C. 90-719.
43. (1985) F.L.C. 91-627.

44. Gray Reallocation of Property on Divorce (1976), 236, refers to this as the principle of "economic causality".

PART C:

45. (1980) F.L.C. 90-908 at 75 744.
46. There was no evidence that the wife lost anything as a consequence of the husband's closing the doors of the family business so she did not receive any compensation. However, the husband was ordered to assume the burden of all the losses which had accumulated as the result of this act by reason of deterioration in the value of the stock and increase in the debts of the business.
47. (1981) F.L.C. 91-092 at 76 644 to 76 645.
48. For an English example, see Martin v. Martin (1976) 3. All E.R. 625, 629 (C.A.).
49. But note the warning of Shone (1977) 17 Alberta L.R. 143, 174, who queries whether alterations in the distribution of property would be warranted on the strength of more minor infractions such as mere bad judgment as opposed to reckless speculation or unwise management as opposed to blatantly irresponsible handling.
50. Kowaliw (1981) F.L.C. 91-092 at 76 645. In Kutcher (1978) F.L.C. 90-453, Murray J. held that the husband had incurred certain liabilities in his business "unnecessarily" and the liabilities could not as a result be taken into account in his favour in determining what was just and equitable by way of a property order or an order for maintenance.
51. See Sieling (1979) F.L.C. 90-627 at 78 264 per Evatt CJ. and Marshall SJ.
52. (1932) A.C. 562. Note that proceedings under s.79 (and s.75, as incorporated by s.79(4)) rest on a much broader basis than an action for the tort of negligence.
53. McDonald in The Economic Consequences of Marriage Breakdown in Australia (Institute of Family Studies, Melbourne (1985), 15 to 16, lists four types of assets by the majority of the couples in the sample he studies: bank accounts (90%); equity in houses or flats (82%); furniture (99%) and cars (97%). About 70% of younger couples and 50% of older couples had house mortgages. Such assets were generally viewed as being jointly-owned, although cars proved to be an exception. Over 70% of the couples had joint bank accounts. In aggregate terms, including superannuation, among younger couples, 70% of wealth was owned jointly, whilst among older couples, 55% was owned jointly. (Ibid., 17).
54. Kowaliw (1981) F.L.C. 91-092.
55. Ibid. In MacSwain v. MacSwain (1986) 49 R.F.L (2d.) 247, the husband rented out property in the separation period at less than market rental but was allowed to claim his losses.
56. Kimber (1981) F.L.C. 91-085. While the Full Court by a majority - Simpson SJ. and Lindenmayer J. - upheld the decision of Elliott J. at first instance, Evatt CJ. was of the view that more weight should have been attached to the greater contribution made by the husband to the assets of the parties, as he already owned two taxi licences and had accumulated some savings at the time of his marriage. In two Canadian decisions, Cotton v. Cotton (1981) 23 R.F.L. (2d.) 78 (P.E.I.S.C.) and Seaman v. Seaman (1981) 24 R.F.L. (2d.) 433

- (Ont. Co. Ct.) an asset disposed of in the separation period was considered a family asset and subject to sharing under the deferred community of property systems in those jurisdictions.
57. (1981) F.L.C. 91-060. Note Kemp (1986) F.L.C. 91-709 - husband had removed plant, machinery and livestock from the farm after separation, although this matter was not at issue before the Court. See Part D, paragraph (b)(ix) for the position regarding the recovery of items stolen by one spouse from the other.
  58. See Fogarty J.'s judgment in Kimber, *ibid.*, at 76 482. For a New Zealand decision in which the value of the property to be divided was adjusted, see Meikle v. Meikle (1979) 1 N.Z.L.R. 137.
  59. See Brown v. Brown (1982) 1 N.Z.L.R. 513. Post-separation dissipation of assets was also considered in Castle v. Castle (1980) 1 N.Z.L.R. 14 and in Martin v. Martin (1976) 3 All E.R. 625 (C.A.).
  60. (1982) F.L.C. 91-279.
  61. Discussion Paper No. 22 Matrimonial Property Law (June 1985), paras. 190 to 193. Also discussed in Chapter Three, Part A(e) of this study.
  62. It should be noted, however, that in its survey of divorced couples, the Australian Institute of Family Studies found that in the majority of cases, the spouses had regarded the household furniture as jointly owned during the currency of the marriage so it is debatable whether the introduction of a presumption of joint ownership would improve matters: See Settling Up (ed. McDonald, 1986) 196.
  63. (1982) F.L.C. 91-241.
  64. Page (1981) F.L.C. 91-525.
  65. (1981) F.L.C. 91-085.
  66. The house was neglected to such an extent that the front steps fell down and entry and egress had to be performed by means of a ladder.
  67. Burger v. Burger (1986) 48 R.F.L. (2d.) 158. Antmann (1980) F.L.C. 90-908 provides an Australian example of deliberate mismanagement of business assets after marital breakdown.
  68. Prestwich (1984) F.L.C. 91-569.
  69. (1977) 3 Fam. L.R. 11 182.
  70. (1980) F.L.C. 90-830.
  71. *Ibid.*, *per* Wood S.J. at 75 255.
  72. (1977) F.L.C. 90-322.
  73. (1978) F.L.C. 90-447. (Fogarty J. dissented.)
  74. Compare the actions of the wife in Cordell (1977) F.L.C. 90-322.
  75. Fogarty J. would have deducted just half of the estimated loss on the aborted sale because he could not see any reason "...for punishing him or for imposing upon his (sic.) greater financial burdens than are appropriate in the circumstances". (Fraser (1978) F.L.C. 90-477 at 77 283.) It is submitted, however, that the majority's decision was the only just result in a case where sole responsibility for the economic loss sustained accrued from the actions of one spouse.
  76. (1984) F.L.C. 91-552.
  77. (1980) F.L.C. 90-911.
  78. Since the amendments made to the Married Women's Property Act 1882 (Eng.) in 1964, actions between spouses for detinue and conversion of chattels may be taken under the summary

- procedure provided by the Married Women's Property legislation: see Pettitt v. Pettitt (1969) 2 W.L.R. 966 at 994 to 995, per Lord Diplock.
79. Hiero Pty. Ltd. v. Somers and Ors. (1983) 47 A.L.R. 605, 612, per Ellicott J., cited by Elliott J. in Madjeric (1984) F.L.C. 91-552 at 79 461.
  80. See Chapter Four for details.
  81. (1984) F.L.C. 91-500. See Kovacs (1985) 59 L.I.J. 296, 299.
  82. Bradley v. The Commonwealth (1973) 1 A.L.R. 241, 256.
  83. Acts Interpretation Act 1901-1966 (Cth.), s.13(1) and s.13(3).
  84. Under the common law concept of unity of person, the husband and the wife could not sue each other.
  85. The wife had not specifically pleaded her claim but she was given leave to take the matter to a further hearing of the Court.
  86. Elliott J. envisaged that the wife's claim, when pleaded, would be likely to encompass elements such as wrongful interference with property or breach of duty as a bailee.
  87. (1984) F.L.C. 91-552.
  88. (1978) F.L.C. 90-525.
  89. Ibid., at 77 785.
  90. Compare L. (1978) F.L.C. 90-493. Wood SJ. could not find that the husband's conversion of a life insurance policy, in respect of which the wife had paid all the premiums, in order to finance his land dealings, directly and indirectly, amounted to a disposition he could set aside under s.85, for the proceeds were not used for any selfish or hidden purposes.
  91. Australian Family Property Law (1984), 30.
  92. Married Women's Property Act 1901 (N.S.W.), s.22, allows a spouse to apply for a declaration "...in any question between husband and wife as to the title to or possession of property" so long as that application is not a "matrimonial cause" as defined in the Family Law Act. S.66G of the Conveyancing Act 1919 (N.S.W.) empowers the New South Wales Supreme Court to deal with an application by a spouse or a former spouse for the appointment of trustees for sale of property jointly owned by the spouses or former spouses so long as the application does not constitute a "matrimonial cause".
  93. For a comprehensive analysis, see Wade Property Division upon Marriage Breakdown (1984), 193 to 209.
  94. For example, see Pockran and Crewes; Pockran (1983) F.L.C. 91-311.
  95. Kowaliw (1981) F.L.C. 91-092 at 76 645 (Baker J.) The Court held that there should be joint liability for loans raised to further the purposes of the family in Sinclair v. Sinclair (1974) 13 R.F.L. (2d.) 352 (B.C.S.C.).
  96. McDiarmid v. McDiarmid (1978) 29 R.F.L. (2d.) 132 (Sask. Q.B.)
  97. Settling Up (ed. McDonald, 1986), 201.
  98. Ibid., 203.
  99. Ibid.
  1. Ibid.
  2. Prince (1984) F.L.C. 91-501. Note that the court refused to exercise its accrued jurisdiction in that case, however.
  3. For example, Prince, ibid.; Pickard (1981) F.L.C. 91-501.
  4. See Chapter Five under heading "Section 79".
  5. For example, Wagner (1984) F.L.C. 91-518.
  6. (1984) F.L.C. 91-555. See Chapter Six, Part F, for details of this decision.

7. Pockran and Crewes; Pockran (1985) F.L.C. 91-311.
8. This may have the effect of deterring creditors from intervening in s.92 proceedings. For example, the creditor in Prince (1984) F.L.C. 91-501 did not pursue its application for leave to intervene when the case came to appeal.

PART D:

9. (1977) F.L.C. 90-216.
10. See also McLeod and Somlo (1976) F.L.C. 90-073 (the fact that the wife had gone to live with another man in a de facto situation assumed relevance because of the financial implications the association brought with it); Lang v. Lang (1976) 1 Fam. L.R. 11 283 (decision of Connor J. in the Supreme Court of the A.C.T.); Zappacosta (1976) F.L.C. 90-089 (McCall J.: misconduct *per se* is irrelevant); Patterson v. Patterson (1979) F.L.C. 90-705 (husband was living with a woman who was not contributing to the rent of the accommodation they shared, although she was in employment. Wood J. took the woman's capacity to pay into account when he considered the wife's claim for maintenance: see 78 759.) As to this aspect of maintenance claims generally, see Goodman (1980) 5 Legal Service Bulletin 277. As to the difficulty of making value judgments as to how people should behave, see Chisholm and Jessep (1981) 4 U.N.S.W.L.J. 43, 55.
11. See also Jones v. Jones (1975) 2 All E.R. 12 (C.A.); S. v. S. (1973) 118 S.J. 167.
12. The wife sought an order that her husband transfer to her all his interest in the matrimonial home.
13. (1977) F.L.C. 90-216 at 76 125.
14. Compare Rogers (1980) F.L.C. 90-874, where the husband's assault was held to be irrelevant as it had produced no lasting effects.
15. (1980) F.L.C. 90-886.
16. The husband had driven a car at the wife, causing her injuries: Wade Property Division upon Divorce (1982), 121.
17. (1977) F.L.C. 90-216.
18. Hack (1980) F.L.C. 90-886 at 75 595. But compare Sharp v. Sharp (1978) F.L.C. 90-470, where it was held that for the court to resolve civil disputes and then take any declared liability into account in the formulation of a comprehensive order under s.79 was consonant with the duty imposed on the Court by s.81 of the Act to end, so far as practicable, the financial relations between the parties and to deter further proceedings between them. (It was a condition of the order that no separate proceedings be maintained in respect of the civil claim.)
19. In formulating his orders, his Honour took into account the wife's pension entitlements: Hack (1980) F.L.C. 90-886 at 75 597.
20. (1975) 2 All E.R. 12. English Law Commission (report 112, The Financial Consequences of Divorce, para. 39) recommended the retention of conduct in the list of circumstances to which the court should have regard where it would be inequitable to do otherwise.
21. (1983) F.L.C. 91-316.
22. (1976) F.L.C. 90-048.

23. The Full Court, while of the view that the amount was appropriate, said that the order for the lump sum payment did not make it clear whether the sum was to replace capital spent by the wife during the illness following the termination of the marriage, whether it was in aid of the financial rehabilitation of the wife, or whether it was awarded "... on the basis that by her own earnings and sacrifice she had enabled her husband to obtain well-paid employment": ibid., 75 203.
24. For example, Soblusky (1976) F.L.C. 90-124 (Full Court); Ferguson (1978) F.L.C. 90-124 (Full Court); Groutsch (1978) F.L.C. 90-461 (Murray J.).
25. Steinmetz (1980) F.L.C. 90-801. See also Schulsinger (1977) F.L.C. 90-207; Brett v. Brett (1969) 1 W.L.R. 487 (C.A.). As to religious divorces generally, see Gleen (1980) 28 Am. J. Comp. Law 1. Of interest is a letter written by a member of the N.S.W. Division of the National Council of Jewish Women of Australia to the Editor of the Australian Family Lawyer ((1986) Aust. Family Lawyer 16) on the subject of the "Get".
26. Steinmetz (1980) F.L.C. 90-801. Brazel (1984) F.L.C. 91-568 established that the rate of interest to be applied in such a case is that laid down in the Family Law Regulations, now the Family Law Rules. Note the comment of Nygh J. in Woolley (1981) 6 Fam. L.R. 577 to the effect that it is not consonant with the Family Law Act to take into account a wife's prospects of remarriage. Steinmetz can be justified, however, on the basis that the Court was applying the financial considerations in s.75(2).
27. (1984) F.L.C. 91-590. Compare Fraser (1978) F.L.C. 90-447, where the husband's actions aborted the auction of property.
28. Ibid., 79 755.
29. His Honour took into account the financial contributions and the earning capacities of both parties as well as the wife's contribution to the welfare of the family: ibid., 79 755 to 79 756.
30. (1984) F.L.C. 91-590 at 79 755.
31. For example, see Cacek v. Cacek (1979) F.L.C. 90-637; Kimber (1981) F.L.C. 91-085; Heath and Heath; Westpac Banking Corporation (1983) F.L.C. 91-362. About 70% of younger couples and 50% of older couples in Australia have house mortgages: McDonald The Economic Consequences of Marriage Breakdown in Australia (1985), 17.
32. Kimber (1981) F.L.C. 91-085. (The Full Court by a majority approved the orders made at first instance.) See also Cacek v. Cacek (1979) F.L.C. 90-637.
33. (1983) F.L.C. 91-362.
34. The case has a close analysis of the meaning of the terms "bona fide purchaser" and "other person interested". See Chapter Five under the heading "Section 85".
35. White (1982) F.L.C. 91-246. (Husband used most of proceeds of two mortgages for his personal benefit.) Note the result in Mead (1983) F.L.C. 91-354: the Court realised that the husband would be unlikely to repay debts even though he had incurred them and should therefore bear responsibility for them. Accordingly, Asche SJ. transferred all equity in the home to the wife and gave her responsibility for the loan.
36. (1982) 43 A.L.R. 700, 702. The principle was denied in Re Berry (A Bankrupt) (1978) 2 N.Z.L.R. 373 (C.A.)



37. Paragraph 177 of the A.L.R.C. Discussion Paper No. 22 Matrimonial Property Law (June 1985). See also Chapter Three, Part A, paras. (d) and (e) of this study.
38. Discussion Paper No. 22, ibid., paras. 178 to 180; Chapter Three, ibid.
39. Discussion Paper No. 22, ibid., para. 181.
40. Discussion Paper No. 22, ibid., para. 182. See also Chapter Three, Part A, paragraph (e) of this study.
41. S.19(1) of the Marital Property Act 1980 (New Brunswick) provides that neither spouse can make a disposition of any interest in the matrimonial home unless the other spouse joins in the instrument.
42. (1980) F.L.C. 90-805.
43. Leigh v. Dickeson (1884) 15 Q.B.D. 60 was relied upon.
44. The Family Law Council Annual Report 1982-3, 43, refers to a Practice Direction of the Family Court which states that, if detailed and precise information relating to all relevant financial matters is not given, it is likely that proceedings will drag on unnecessarily.
45. (1982) F.L.C. 91-250. See also Marinko (1983) F.L.C. 91-307; Oriolo (1985) F.L.C. 91-653.
46. (1981) F.L.C. 91-108 (applied, for example, in Jensen (1982) F.L.C. 91-263 by Nygh J.: see 77 472). See also Macura (1982) F.L.C. 91-252.
47. Regarding disclosure, 0.17, r.2 of the Family Law Rules now imposes a duty of disclosure on the respondent. See also Sutera (1983) F.L.C. 91-365 (non-disclosure held to amount to fraud); Livesey v. Jenkins (1985) 1 All E.R. 106 (House of Lords); Briese (1986) F.L.C. 91-713; Oriolo (1985) F.L.C. 91-653 (Full Court). See also Chapter Five under the heading "Section 79A".
48. See also Tuck (1981) F.L.C. 91-021; MacGregor (1981) F.L.C. 91-028; Rouse (1981) F.L.C. 91-073; Barro (No. 2) (1983) F.L.C. 91-317. In A Summary of Family Property Cases in Australia, the A.L.R.C. reports that Judges and Registrars gave obduracy as one of the two most common reasons why cases before them had not been settled: (1985) Reform 134, 136.
49. (1980) F.L.C. 90-800.
50. The High Court, which was concerned with s.117(2) as it read prior to the 1983 amendments, held that it was not necessary for there to be special circumstances. Murphy J. dissented, taking the view that there must be "an exceptional case" before an award for costs can be justified: see 75 055.
51. The husband's refusal to obey a restraining order was regarded as "financial misconduct" in Perry (1979) F.L.C. 90-701.
52. Howard (1982) F.L.C. 91-279. See 0.38, rr.19 and 20.
53. (1982) F.L.C. 91-250. See also Thomas (1981) F.L.C. 91-018; Re Lusink; ex parte Shaw (1980) F.L.C. 90-884 at 75 585 (per Stephen J.); Marinko (1983) F.L.C. 91-307. See generally Report of the Joint Select Committee on the Family Law Act (1980), para. 11.34 to 11.52.
54. (1982) F.L.C. 91-263 at 77 472, although nevertheless he followed Greedy (1982) F.L.C. 91-250.
55. Talbot v. Talbot (1979) F.L.C. 90-696 (husband undervalued his quarter share in a farming property, thereby forcing the wife into obtaining the services of a real estate valuer to ascertain the true value). See also Penfold v. Penfold (1980) F.L.C. 90-800 (wife was compelled to establish husband's true

- financial position). Note the result in Wunderlich (1982) F.L.C. 91-236: Ross-Jones J. refused the bank's application for costs since the time and effort spent in locating and collating documents required to be produced was not referred to in reg.115. See now 0.20 r.17 Family Court Rules.
56. Kelly (No. 2) (1981) F.L.C. 91-108; Greedy (1982) F.L.C. 91-250; Jensen (1982) F.L.C. 91-262. In Hogan (1986) F.L.C. 91-704, Maxwell, Gun and Elliott JJ. in a joint judgment state the law as to the awarding of cost orders. See also Oriolo (1985) F.L.C. 91-653 (Full Court).
  57. Antmann (1980) F.L.C. 90-908.
  58. Aroney (1979) F.L.C. 90-709, per Nygh J. The wife gave evidence that the husband kept money and diamonds in a lowboy in the matrimonial home, but she could not say how much money or how many diamonds were kept there.
  59. Unreported, 19th June 1974, (N.S.W.C.A.), page 4.
  60. Cited with approval by Goldstein J. in Evans (1978) F.L.C. 90-435 at 77 210 to 77 211. Compare this approach with that of awarding costs against the part as for example in Greedy (1982) F.L.C. 91-250; Kelly (No. 2) (1981) 91-108, which are discussed above.
  61. Stowe (1981) F.L.C. 91-027 (Full Court).
  62. Thomas A. Edison Ltd. v. Bullock (1912) 15 C.L.R. 679.
  63. The Australian Institute of Family Studies' survey of divorced couples found that many husbands regard a wife's participation in the family business as being merely a convenience for taxation purposes: Settling Up (eg. McDonald, 1986), 209.
  64. For example, see Smith v. Jenkins (1970) 119 C.L.R. 397, 411 to 412.
  65. (1977) F.L.C. 90-267.
  66. Contribution assumes importance when the Family Court is quantifying a party's interest in a partnership held between the spouses. While it has no jurisdiction other than to declare the nature of the parties' respective interests in the partnership (Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606, High Court, Murphy J. dissenting), in so doing the Family Court may "...determine whether any assets belong to the parties personally or are part of the assets of the partnership, what the net value of the shares of the partnership is, and consequently, what the nature and extent of the indebtedness of the partnership is". (af Petersens (1981) F.L.C. 91-095 at 76 666 per Nygh J.) The decision in Miller (1977) F.L.C. 90-326 illustrates the fact that the Family Court considers contribution rather than actual legal rights as defined by the partnership agreement.
  67. Elias (1977) F.L.C. 90-267 at 76 424 to 76 425.
  68. See also Underwood (1981) F.L.C. 91-020 and Pickard (1981) F.L.C. 91-034.
  69. (1977) F.L.C. 90-267 at 76 424 per Goldstein J. See also Martin v. Martin (1959) 110 C.L.R. 297 at 305 (High Court). For comment on the use of tax planning schemes to consolidate the interests of the husband to the detriment of the wife, see Business Review Weekly, 4-11 September 1982, and Browne (1984) Personal Investment (Feb. issue), 55. Compare Pickard (1981) F.L.C. 91-034; Nygh J. found that any presumption of advancement was rebutted by the wife's own evidence.

70. It is submitted that the result would be different where evidence could be produced to show that the transfer of assets has been for inadequate consideration or for lack of consideration whereas a claim has been made previously that valuable consideration has passed.
71. (1978) F.L.C. 90-453.
72. Antmann (1980) F.L.C. 90-908; Kimber (1981) F.L.C. 91-085; Kowaliw (1981) F.L.C. 91-092; af Petersens (1981) 91-195.
73. (1981) 20 R.F.L. (2d.) 85.
74. Legislation based on the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (Scot.), ss.6 and 7, discussed in sub-paragraph (ii) above would provide protection against the sale of the matrimonial home at an undervalue since the non-owner spouse's permission for the disposition is a pre-requisite.
75. Settling Up (ed. McDonald, 1986), 214.
76. (1984) F.L.C. 91-545.
77. Perlman v. Perlman (1984) F.L.C. 91-500 per Gibbs CJ. at 79 058.
78. Philip Morris Inc. v. Adam P. Brown Male Fashions (1981) 33 A.L.R. 465.
79. (1976) F.L.C. 90-110.
80. (1978) F.L.C. 90-470 (relying on Slattery, ibid., in which in fact, no mention was made of s.78.)
81. As to choses in action as a form of property, see Bates (1978) 8 Fam. Law 24 and Sykes The Law of Securities (3rd. ed., 1978), 594. In Duff (1977) F.L.C. 90-217 at 76 133, the Full Court expressly included them within the scope of "property" as defined in s.4(1) of the Act.
82. See also Barkley v. Barkley (1977) F.L.C. 90-216.
83. (1978) F.L.C. 90-481. Hardingham and Neave Australian Family Property Law (1984), 287, express their approval of this approach. Gee J. in D and D (S85 Application) (1984) F.L.C. 91-593 in obiter dicta stated that a wide view of "property" such as that taken in Duff (1977) F.L.C. 90-217 would encompass a chose in action for debt and enable s.78 to be used to recover such debt.
84. (1975) 1 Q.B. 373.
85. (1977) F.L.C. 90-274.
86. Australian Family Property Law (1984), 287.
87. Tunstall v. Tunstall (1953) 2 All E.R. 310; Bridges v. Bridges (No. 1) (1953) Q.W.N. 31; Chandler v. Chandler (1955) Q.S.R. 237; Tinson v. Tinson (1967) 2 N.S.W.R. 462; Batke v. Batke (1960) 78 W.N. (N.S.W.) 1039.
88. Crystall v. Crystall (1963) 1 W.L.R. 524.
89. Spellman v. Spellman (1961) 1 W.L.R. 921.
90. (1890) F.L.C. 90-902.
91. Ibid., at 75 678. However, His Honour doubted whether the section could be used to order a third party to restore property to the applicant (at 75 678; 75 680).
92. (1984) F.L.C. 91-552.
93. Mills (1976) F.L.C. 90-079. Wade Property Division upon Marriage Breakdown (1984) at 70 is of the view that the wording of paragraph (ca)(i) is wide enough to include virtually any dispute between married persons over any property owned by one or both of them, however.
94. Settling Up (ed. McDonald 1986), 178 (Table 9.5).

95. Ibid., 195. Respondents to the survey, particularly women, frequently reported that their spouses had money hidden away in accounts of their own, but they had no evidence of this or the amounts allegedly involved.

PART E:

96. Ibid., 203.
97. Note that the law in England has been radically altered as to the obligations of spouses to maintain each other and their children by the Domestic Proceedings and Magistrates' Courts Act 1978.
98. The Shorter Oxford English Dictionary defines "obligation" in part as follows: "(3) moral or legal restraint, or constraining force or influence; the condition of being morally or legally bound, a moral or legal tie binding to some performance". For a full definition and also the definition of "responsibility", see Lutzke (1979) F.L.C. 90-714 at 78 836.
99. (1976) F.L.C. 90-089.
1. Crawford (1979) F.L.C. 90-647 at 78 411.
  2. For example, Nutting (1978) F.L.C. 90-410; Brady (1978) F.L.C. 90-513.
  3. But note that there are rarely sufficient funds to transform one household into two households of equal affluence.
  4. For example, Fane-Thompson (1981) F.L.C. 91-053. For an English decision, see Shinh v. Shinh (1977) 1 All E.R. 97, 103. Note that in Fitzgibbon (1985) F.L.C. 91-614, Hogan J. granted the wife's application for an order whereby the Commonwealth was ordered to pay her, by way of garnishment, the husband's taxation refund. Her application was prompted by the husband's failure to pay maintenance over a period of some six years. The wife in McKenzie v. McKenzie (1985) 45 R.F.L. (2d.) 296 was also compensated for lack of support during separation.
  5. Law Commission of Canada Working Paper 12, Maintenance and Divorce (1975); Sackville (1970) M.U.L.R. 353; Scottish Law Commission, Memorandum No. 22 Aliment and Financial Provision (1976), para. 3.7; Gray Reallocation of Property on Divorce (1977), 290 ff.; Eng. Law Commission Discussion Paper The Financial Consequences of Divorce: The Basic Policy (1980).
  6. (1977) F.L.C. 91-354. See also Boutros v. Boutros (1983) 30 R.F.L. (2d.) 348.
  7. Mead (1983) F.L.C. 91-354.
  8. The assumption of the entire burden of caring for the children of the marriage during separation was considered to be relevant in Groutsch (1978) F.L.C. 90-461; Wardman and Hudson (1978) F.L.C. 90-466 (Full Court); Park (1978) F.L.C. 90-509; Rolfe (1979) F.L.C. 90-629 (Full Court). See also Meikle v. Meikle (1979) 1 N.Z.L.R. 137 (C.A.); Bronwich v. Bronwich (1977) 1 N.Z.L.R. 613, 615.
  9. This was the approach taken by Murray J. in Groutsch (1978) F.L.C. 90-461.
  10. See Mead (1983) F.L.C. 91-354 at 78 369 per Asche SJ. See also Mackie (1981) F.L.C. 91-069.
  11. (1979) F.L.C. 90-708.
  12. (1982) F.L.C. 91-207, per Evatt CJ. and Strauss J.

13. Although the case concerned a maintenance application, it is submitted that the principle remains the same.
14. What, also of the applicant for a financial order under part VIII who has conducted himself or herself in such a manner as to unreasonably affect his or her earning capacity? Does such conduct mean that he or she is disentitled to an order which takes into account his or her future needs even though these needs have actually increased because of the conduct?
15. (1980) F.L.C. 90-908. In many cases, post-separation contributions made by the husband (for example, the meeting of mortgage payments) will be deemed to be equalled by those of the wife (for example, her efforts in maintaining the home and caring for the children of the marriage): e.g. Wardman and Hudson (1978) F.L.C. 90-466 at 77 383; Suttill v. Graham (1977) 1 W.L.R. 819. In Baillargeon v. Baillargeon, (1982) R.F.L. (2d.) 403, the Saskatchewan Queen's Bench ordered the husband to pay the wife one half of what the equity in the matrimonial home would have been had he preserved the equity during the separation period by paying mortgage instalments.
16. Prestwich (1984) F.L.C. 91-569. Deliberate failure to do so resulting in waste of the assets must be borne by that party; see part C of this chapter.
17. (1980) F.L.C. 90-908.

18. Wardman and Hudson (1978) F.L.C. 90-466 at 77 382 to 77 383. Note, however, the exception with respect to the value of an interest in a joint tenancy described by Wood SJ. in L. (1978) F.L.C. 90-493, that is, valuation should be as at the date of severance. The injustice of valuing property at the date of dissolution rather than the date of the separation in some instances is made clear by a Canadian case, Brayford v. Brayford (1981) 17 R.F.L. (2d.) 143 (B.C.S.C.). Although the husband had dissipated the proceeds of the sale of shares and had incurred further debts, no order in favour of the wife, could be made as the court looked at the value of the parties' assets at the date of dissolution.
19. For example, Zappacosta (1976) F.L.C. 90-089.
20. Superannuation expectancies fall within this exception: Woolley (No. 2) (1981) F.L.C. 91-011; Noel (1981) F.L.C. 91-035.
21. (1985) F.L.C. 91-628.
22. As in Kowaliw (1981) F.L.C. 91-092; see also Joecks v. Joecks (1983) 30 R.F.L. (2d.) 269 (B.C.S.C.).

#### PART F:

23. (1981) 4 U.N.S.W.L.J. 43, 58.
24. (1981) F.L.C. 91-021.
25. (1981) F.L.C. 91-003.
26. (1976) F.L.C. 90-124.
27. (1978) F.L.C. 90-500.
28. See detailed analysis in Chapter Five, Part B, under "Section 79".
29. Almost invariably, according to cases reporting instances in which property has been manipulated, this is the husband.
30. For example, Antonarkis and Anor. v. Delly and Anor. (1976) F.L.C. 90-063 (mother claimed an interest in the matrimonial home); Wray (1981) F.L.C. 91-059 (Full Court approved the injunction granted at first instance for it was open on the facts to find that the restraining order was made to protect the wife in her right to claim contribution from the husband in meeting the debt due to the wife's mother, who had lent the parties \$34,000 to purchase the matrimonial home.)
31. For example, Ascot Developments Pty. Ltd. v. Harper and Harper (1981) F.L.C. 91-000 (family company successfully prevented the enforcement of permanent orders to register share transfers); Wagner and Wagner; Wolfgramm (1984) F.L.C. 91-518 (Court refused to make an order restraining the intervener from proceeding with a mortgage sale because to do so would be to subordinate the legitimate interests of the intervener for those of the husband and prejudice the intervener's rights under the mortgage.)
32. Part B, under the heading "Section 79".
33. Unless in the limited sense of protecting a party's interest in partnership property: Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606 (High Court), or unless the accrued jurisdiction of the Family Court is applicable in the circumstances of the case. (See further Chapter Four, Part A.)

34. Re Ross-Jones; ex parte Beaumont, ibid. The limited jurisdiction over partnership matters is illustrated by a recent case, Raffellini v. Raffellini and Ors. (1985) F.L.C. 91-612 (Supreme Court of New South Wales); see also Raffellini (1986) F.L.C. 91-726.
35. Or s.85A where trust property is concerned.
36. As in Abdullah (1981) F.L.C. 91-003.
37. Re Ross-Jones; ex parte Green (1984) F.L.C. 91-555 at 79 488 per Gibbs CJ.
38. The step-brother's claim in Antonarkis v. Delly (1976) F.L.C. 90-063 was clearly a device as also was the parents' interest as mortgagees in Menz (1980) F.L.C. 90-852.
39. Ascot Developments Pty. Ltd. v. Harper and Harper (1981) F.L.C. 91-000 at 76 061 per Gibbs CJ.
40. Re Dovey; ex parte Ross (1979) F.L.C. 90-616 at 78 191 to 78 192 per Gibbs CJ. See also Ascot Developments, ibid.
41. (1981) F.L.C. 91-104.
42. For full details of joinder, see Chapter Five, under the heading "Section 85".
43. Krotofil (1980) F.L.C. 90-909; Anderson (1981) F.L.C. 91-104, W. (1982) F.L.C. 91-238.
44. (1984) F.L.C. 91-553.
45. Prince (1984) F.L.C. 91-501 at 79 084 per Fogarty J.
46. Barro (No. 2) (1983) F.L.C. 91-317.
47. Prince (1984) F.L.C. 91-501 at 79 084 per Fogarty J., citing Port of Melbourne Authority v. Anshun (1981) 55 A.L.J.R. 621.
48. For example, see Reynolds (1985) F.L.C. 91-632, where the husband's debt of some \$110,000 to the partnership was treated as notional. Taussig (1983) 57 L.I.J. 667, 671, advises caution in dealing with alleged liabilities incurred to friends and relatives.
49. (1980) F.L.C. 90-908.
50. Compare Anderson (1981) F.L.C. 91-104, where the wife's evidence regarding the father-in-law's advance was disbelieved, although, to recover his loan, he would have to take the case to the Supreme Court.
51. (1981) F.L.C. 91-085.
52. Ibid., 76 584.
53. Contrast Zdavkovic (1982) F.L.C. 91-270, where it was held that where a debt to a third party is undisputed both as to its existence and as to its extent, and that debt is likely to be enforced, the Family Court may order a party to repay the debt. Contrast also Wagner and Wagner; Wolfgramm (1984) F.L.C. 91-518, where the property concerned was a commercial property and the transaction between the parties and the wife's father was clearly a genuine commercial transaction.
54. (1981) F.L.C. 91-095.
55. See also Quirk, unreported, 1983 (referred to by Evatt CJ. in Prince (1984) F.L.C. 91-501 at 79 076.) It is arguable that this case would fall within the Family Court's accrued jurisdiction if it were decided now for there is "a common nucleus of fact": see further Chapter Four, Part A.
56. af Petersens (1981) F.L.C. 91-095.
57. The Australian Institute of Family Studies' survey of divorced couples found it was not uncommon for accounts to be manipulated. (Settling Up (ed. McDonald, 1986), 216, 217), even where the business had been a joint undertaking (ibid., 218), or assets to be hidden (ibid., 221).

58. (1984) F.L.C. 91-539.
59. (1981) F.L.C. 91-034 at 79 310.
60. As to this, see Section D of this chapter.
61. Miller v. Karlinski (1945) 62 Times L.R. 185.
62. Silver v. Silver (1958) 1 All E.R. 259, 265, *per* Parker L.J.
63. (1981) F.L.C. 91-021 (Full Court). See also Woodbyrne v. Woodbyrne (1975) 16 R.F.L. (2d.) 180 (Ont. H.C.): husband sold a house to a company over which he had control but no cash was paid. He then sold it to a *bona fide* purchaser for value at a net profit of \$81,000. The Court considered the profit to be a family asset and thus subject to division.
64. *Ibid.*, *per* Strauss J. at 76 224. See also Baxt, Bialkower and Morgan CCH Guidebook to Partnership Law (1980), para. 919.
65. Manley v. Sartori (1927) 1 Ch. 157; Pathirana v. Pathirana (1967) 1 A.C. 223. See discussion in Baxt, Bialkower and Morgan CCH Guidebook to Partnership Law (1980), para. 1124.
66. (1979) F.L.C. 90-606.
67. Particularly Fencott v. Muller (1983) 57 A.L.J.R. 317; Philip Morris Inc. v. Adam P. Brown Male Fashions (1981) 55 A.L.J.R. 120; Stack v. Gold Coast Securities (No. 9) Pty. Ltd. (1983) 57 A.L.J.R. 731. See further Chapter Four, Part A.
68. See Barwick C.J.'s judgment in the Philip Morris Case (1981) 55 A.L.J.R. 120 at 125.
69. Fencott v. Muller (1983) 57 A.L.J.R. 317 at 332.
70. (1982) F.L.C. 91-205.
71. The effect of the s.87 deed formerly approved by the Court was that the parties had abandoned against each other their rights to proceed under Part VIII of the Act and the Family Court thus lacked jurisdiction to deal with the wife's partnership interest: Re Ross-Jones; ex parte Beaumont.
72. Cordell (1977) F.L.C. 90-322.
73. (1981) F.L.C. 91-000.
74. (1984) F.L.C. 91-539.
75. Dickey Family Law and Property: 3 Essays (McCall, Dickey and Wade, 1980), 53, 72.
76. (1977) F.L.C. 90-200 at 76 057 and 76 058.
77. (1977) F.L.C. 90-307.
78. (1979) F.L.C. 90-627.
79. *Ibid.*, 78 262 to 78 264.
80. This was the stance the Full Court had taken in McCarney (1977) F.L.C. 90-200.
81. The "Sieling" injunction has been used in Esmore (1979) F.L.C. 90-711; Badcock (1979) F.L.C. 90-723; Craven (1980) F.L.C. 90-802; Murkin (1980) F.L.C. 90-806; Bak (1980) F.L.C. 90-877; Cullen (1980) F.L.C. 90-899; Macvean (1980) F.L.C. 90-912; Stowe (1981) F.L.C. 91-027; Martiniello (1981) F.L.C. 91-050; Wray (1981) F.L.C. 91-059; Rennie and Higgon (1981) F.L.C. 91-087; Savage and Hodgson (1982) F.L.C. 91-222.
82. (1981) F.L.C. 91-027.
83. *Ibid.*, at 76 271.
84. It gained its name from the second major case which employed the remedy, Mareva Compania Naviera SA v. International Bulk Carriers SA (1975) 2 Lloyd's Reports 509.
85. The Full Court disapproved the Mareva injunction imposed at first instance in Martiniello (1981) F.L.C. 91-050, for they were not convinced that the husband would dissipate the moneys



or transfer them overseas. Moreover, he ought not to have been restrained from carrying out his normal business dealings.

86. Campbell in Mareva Injunctions, a transcript of a seminar held at the Law Institute of Victoria in November 1982 at 2.
87. Rogers and Hatley (1982) 60 Can. Bar. Rev. 1; 29.
88. Searoad Ltd. v. Seatrain (U.K.) Ltd. (1981) 1 All E.R. 806, cited by Ross-Jones J. in Wunderlich (1982) F.L.C. 91-236. As far as the territorial limits of the jurisdiction over moveable property exercised by State Courts under s.17 of the Married Women's Property Act 1882 are concerned, so long as a sufficient connection exists between the parties to the dispute and the jurisdiction in which the claim is brought, the dispute may be decided: Searles v. Searles (1965) V.R. 83; Razelos v. Razelos (No. 2) (1970) 1 W.L.R. 392. Of course, if the dispute amounts to a "matrimonial cause", the Supreme Courts no longer have jurisdiction: s.8(1)(a) of the Family Law Act 1975.
89. Searoad Ltd. v. Seatrain (U.K.) Ltd. (1981) 1 All E.R. 806. As to discovery and interrogations, see Ausburo Forex Pty. Ltd. v. Mare and Ors. (1986) 4 N.S.W.L.R. 419 (Young J.).
90. Bowron (1982) F.L.C. 91-270 (Baker J.).
91. Contrast Allison (1981) 1 S.R. (W.A.) 248: the claim was in personam and the wife was in the jurisdiction so the Court entertained the dispute. The Supreme Court of British Columbia in Karaa v. Karaa (1986) 48 R.F.L. (2d.) 416 was able to order the sale and equal division of the net proceeds of the same of a house in England because it had been purchased as a future family home in part with funds from the same of a previous matrimonial home. In Brink v. Brink (1978) 1 N.Z.L.R. 734, the parties' property interests were readjusted to compensate the wife for the husband's removal of property from the jurisdiction after separation.
92. (1984) F.L.C. 91-539.
93. Compare the English situation: the Court of Appeal in Hamlin v. Hamlin (1985) 3 W.L.R. 629 held that there was jurisdiction to restrain a respondent from disposing of a villa in Spain. The Court was determining rights and obligations arising out of divorce proceedings and would be exercising jurisdiction in personam against a respondent amenable to that jurisdiction.
94. Taussig (1983) 57 L.I.J. 667, 670.
95. (July 1982) The Chartered Accountant 15, 16. This is confirmed in Settling Up (ed. McDonald, 1986), 216, 217, 218.
96. See also Browne (Feb., 1984) Personal Investment, 55. Aldred (1984) F.L.C. 91-510 provides an example of such control of business assets.
97. Discussion Paper No. 22 (June 1985).
98. The results of this survey have been published in Settling Up (ed. McDonald, 1986).
99. See (1985) Reform 134, 136, and Settling Up (ed. McDonald, 1986) 214, 215 to 216 respectively. The latter survey found a lack of unanimity among divorced couples as to the extent of the wife's ownership of a business and her involvement in the working of it. 70% of the wives claimed to be part owners whereas only 51% of the husbands admitted that their wives were part owners: ibid., 207. There was substantial disagreement between men and women over whether the wife had

worked at all in the business: ibid., 209. Many men regarded the wife's participation in the business as merely a convenience for tax purposes: ibid., 209.

1. This recommendation has been put forward in Settling Up, ibid., 222, at the suggestion of a male respondent to the survey: ibid., 218.
2. (1984) F.L.C. 515.
3. As to the valuation of shares in a family company, see W. (1980) F.L.C. 90-872; Hull (1983) F.L.C. 91-360; Mallet v. Mallet (1984) F.L.C. 91-507 at 79 115 per Gibbs CJ., 79 121 per Mason J. As to the difficulties implicit in any attempt at valuation of shares, see A.L.R.C. Matrimonial Property Law, Discussion Paper No. 22, June 1985, 29. As Nygh J. pointed out in Hull, supra there is no fixed rule. Expert evidence is not necessarily required to establish the value of a company if the evidence is available to support a finding: Garrett (1984) F.L.C. 91-539. However, "documents" in s.94A(2) of the Act relates only to documents which form part of the case stated and the Court cannot have regard to other documents: McKay (1984) F.L.C. 91-573.
4. Company minutes are only as good as the meeting itself: falsified minutes confer no rights on the officers of the company. (Bay Marine Pty. Ltd. v. Clayton Properties Pty. Ltd. (1985) 3 A.C.L.C.16).
5. In the survey of divorced couples conducted by the Australian Institute of Family Studies; 14% of the male respondents and 24% of the women admitted making financial arrangements in anticipation of separation: Settling Up (ed. McDonald, 1986), 42.
6. (1982) F.L.C. 91-207.
7. Per curiam (Evatt CJ., Watson SJ. and Strauss J.; Watson SJ. differed on another point raised by the applicant.)
8. (1980) F.L.C. 90-899.
9. Ibid.
10. (1981) F.L.C. 91-003.
11. For a comprehensive review of the law relating to joint tenancies, particularly as it has been modified by Australian family law, see Prindable (1978) 98 C.L.R. 228.
12. Wirth v. Wirth (1956) 98 C.L.R. 228.
13. Wade Property Division upon Marriage Breakdown (1984), 82, points out that when a marriage relationship breaks down and the parties own property as joint tenants, it is often advisable to sever the joint tenancy quickly in order to prevent the property passing by survivorship if one party dies.
14. According to the A.L.R.C., not only has Australia a high rate of home ownership but the great majority of couples own the home jointly: Summary of Discussion Paper No. 22 (June 1985), para. 35. See also Settling Up (ed. McDonald, 1986), 177.
15. These were stated in Williams v. Hensman (1861) 1 J. & H. 546, 558; 70 E.R. 862, 867, by Page-Wood VC. See Butt (1976) 50 A.L.J. 246 for summary.
16. Considered in Calabrese v. Muccio and Muccio (1984) F.L.C. 91-548. (The wife died before the commencement of the 1983 amendments and s.79(8) had no application but the oral agreement between the parties to settle their property affairs

- was effective to sever the joint tenancy in respect of funds held in a joint bank account so that the funds were not subject to the doctrine of jus accrescendi.)
17. For the law regarding undue influence in business dealings between spouses, see (1985) 129 S.J. 211 and 234. According to Lord Scarman in National Westminster Bank v. Morgan (1985) 2 W.L.R. 588 (H.L.) at 597, the transaction must be one in which an unfair advantage has been taken of another.
  18. For details, see Chapter Five, under the heading "Section 79A".
  19. Conveyancing Act 1919 (N.S.W.) Part IV, Div.6; Property Law Act 1958 (Vic.), Part IV; Law of Property Act 1936-1980 (S.A.), ss. 69 to 71; Property Law Act 1974-1981 (Q.), Part V, Div.2; Property Law Act 1969-1979 (W.A.), Part XIV; Partition Act 1869 (Tas.) ss. 3 to 5. See also Marriage Act 1958 (Vic.) s.161, especially s.161(10), and Family Court Act 1975-1982 (W.A.), ss. 29, 30.
  20. Apathy (1977) F.L.C. 90-250; Papas (1983) F.L.C. 91-358. Note, however, that doubts were raised in McDougall (1976) F.L.C. 91-358. In Mylonas v. Mylonas (1981) 7 Fam. L.R. 826, Kennedy J. pointed out the inappropriateness of the Family Court's procedures to resolve what amounted to a claim for sale and partition and a counter-claim for a declaration of trust, for a third party was involved.
  21. For example, see In the Marriage of Slater (1974) 24 A.L.R. 501.
  22. In Pflugrad, (1981) F.L.C. 91-052 a disposition to a minor child was set aside under s.85 but the child was awarded a remainder interest under s.79 when Elliott J. formulated the property order. See Chapter Five under the heading "Section 85" for the operation of the provision.
  23. The amendment overcomes the situation that arose in Esmore (1979) F.L.C. 90-711, where a wife was restrained from proceeding with a property claim in the Supreme Court of New South Wales because such proceedings for the sale and division of the matrimonial home would be decided solely on the basis of the parties' entitlement as joint tenants. No longer will an applicant be able to frustrate a claim through the intervention of another court.
  24. Menz (1980) F.L.C. 90-852 (husband's parents ordered to execute a discharge of mortgage); Anderson (1981) F.L.C. 91-104 (husband's brothers-in-law orders to execute transfers of property).
  25. Anderson, *ibid*.
  26. Pertsoulis (1980) F.L.C. 90-832; Davies v. Davies (1983) W.A.R. 305; Patzak v. Lytton and the Registrar of Titles (1984) F.L.C. 91-550.
  27. Badcock (1979) F.L.C. 90-723. Compare Golding v. Hands (1969) W.A.R. 121; Nelson-Jones v. Fedden (1974) 3 All E.R. 38. Note that a disposition of an interest to trustees pending the resolution of s.79 proceedings makes no alteration to the beneficial interest in the joint tenancy as between the spouses (Badcock, *supra*). Only the rights of survivorship are destroyed.
  28. For example, Re Murdoch and Barry (1975) 64 D.L.R. 222. The joint tenant wife executed and registered a transfer to herself. Even though she did not notify her husband, her transfer was held to be a valid severance of the joint

- tenancy. Contrast the situation in McNab v. Earle (1981) 2 N.S.W.L.R. 673: the wife executed a memorandum of transfer purporting to transfer to herself her interest as a joint tenant in Torrens Land. The transfer was not registered. Needham J. held that the transfer, being unregistered, was inoperative. Presumably, severance would have been effected had the transfer been both executed and registered: see Butt (1982) 56 A.L.J. 490.
29. Walker (1977) F.L.C. 90-306 at 76 617 (Bell J.).
  30. Page (No. 2) (1982) F.L.C. 91-241; Holley (1982) F.L.C. 91-257 (no order can be made while the respondent's property is vested in a trustee under a deed of assignment under Part X of the Bankruptcy Act 1966 (Cth.)); Garmonsway (1986) F.L.C. 91-746 (husband's property vested in Trustee in Bankruptcy in 1977 so at the date of the Family Court hearing of the wife's application under s.78, husband had neither property nor rights in respect of the matrimonial home). It should be noted that the general rule is that a bankrupt may not commence legal proceedings without the consent of the trustee and those proceedings are in any event to be pursued by the trustee: Shiff and Waters (1985) 8 U.N.S.W.L.J. 40, 49. Proceedings under the Family Law Act for maintenance and property are probably an exception to this general rule because they are actions in personam and not in rem. However, any property which a bankrupt was ultimately to receive as a result of such proceedings would fall under the definition of "after acquired" property in the Bankruptcy Act and vest immediately in the trustee to be divided amongst the creditors: Shiff and Waters, *ibid.*, 49.
  31. Page (No. 2), *ibid.*, citing Coffey v. Bennett (1961) V.R. 264.
  32. Melson v. Mullen (1985) F.L.C. 91-611. The anomaly in the fact that the Bankruptcy Act protects voluntary property agreements made between the parties under the Family Law Act before bankruptcy but not orders made by the Family Court before bankruptcy is a subject for investigation by the General Insolvency Inquiry: Issues Paper No. 6., Jan. 1985, 27. See also Wade Property Division upon Marriage Breakdown (1984), 556, and Shiff and Waters (1985) 8 U.N.S.W.L.J. 40, 45, 47.
  33. (1984) F.L.C. 91-524.
  34. Baker J.: such a matter is for the investigation of the Bankruptcy Court.
  35. (1982) F.L.C. 91-204.
  36. (1980) F.L.C. 90-813 (following Ganas v. Ganas (1971) 18 F.L.R. 298.)
  37. Davies (1980) F.L.C. 90-868; Milland (1981) F.L.C. 91-065; Holley (1982) F.L.C. 91-257; Bassola; Official Trustee in Bankruptcy (1985) F.L.C. 91-623; Bassola; Official Trustee in Bankruptcy (No. 2) (1985) F.L.C. 91-629.
  38. (1981) F.L.C. 91-065. The husband had called a creditors' meeting under s.188 of the Bankruptcy Act and executed a Deed of Assignment with the creditors under Part X. At that time, the husband was divorced from his wife but a property or maintenance order had yet to be made.
  39. (1982) F.L.C. 91-257.

40. The Deed of Assignment was allowed to stand, for the wife had participated in its making, and the husband and the third parties (the Trustee in Bankruptcy and the purchasers of the business) had acted bona fide. Compare Milland (1981) 91-065, where the Deed of Assignment was set aside.
41. Wallmann (1982) F.L.C. 91-204.
42. Bankruptcy Act 1966 (Cth.), s.121.
43. Ibid., s. 120.
44. Ibid., s. 122.
45. Ibid., s. 115. See Wade Property Division upon Marriage Breakdown (1984), 334 to 335.
46. The A.L.R.C. General Insolvency Inquiry is investigating whether this "first in, first serve" policy should give way to some form of protection for a spouse: Issues Paper No. 6, Jan., 1985, 26.
47. (1985) 8 U.N.S.W.L.J. 40, 53 to 54.
48. Ibid., 54.
49. Wade Property Division upon Marriage Breakdown (1984), 51.
50. As to mortgages, see Part D (b)(ii) of this chapter.
51. Matrimonial Property Act (N.Z.) s.20, as amended by Matrimonial Property Amendment Act (No. 2) 1983, s.6. Many Canadian and U.S. jurisdictions have similar "homestead" provisions: A.L.R.C. Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 196.
52. In relation to a guarantee for a mortgage loan, the English Court of Appeal in Kings North Trust Ltd. v. Bell (1986) 1 W.L.R. 119 said obiter that where a debtor could be expected to exert influence over the third party from whom a guarantee is sought, the creditor (or intending lender) ought for his own protection insist that the third party has independent advice.
53. Shiff and Waters (1985) 8 U.N.S.W.L.J. 40, 60, citing Sophie Watson Housing after Divorce, Research Paper No. 2, Matrimonial Property Inquiry, Australian Law Reform Commission.
54. The Report of the Review Committee on Insolvency Law and Practice ("The Cork Report") H.M.S.O. Cmd. 8558 (June 1982).
55. The recommendations above are summarised from paras. 1124 to 1131 of the Report.
56. Shiff and Waters (1985) 8 U.N.S.W.L.J. 40, 61.
57. Property under the control of a spouse which is intended for and is used exclusively by one of the parties during marriage (for example, because it was an inheritance or a gift) may not be an asset which falls to be apportioned under s.79(1): W. (1980) 90-872 (Nyg J.). (Compare Carter (1981) F.L.C. 91-061.) Contrast the position where assets which have been vested in a family company over which the husband has sole control consist of assets which have derived from both parties to the marriage, as in Kelly (No. 2) (1981) F.L.C. 91-108; Poulos (1984) F.L.C. 91-515. Compare Yates (No. 1) (1982) F.L.C. 91-227.
58. As to the relationship between trusts and bankruptcy, see Lee (1973) 47 A.L.J. 365.
59. In Kelly (No. 2) (1981) F.L.C. 91-108 the Full Court differentiated between "property" and "financial resources".
60. As in Kelly (No. 2), ibid.; Garrett (1984) F.L.C. 91-539; Yates (No. 1) (1982) F.L.C. 91-227.
61. (1981) F.L.C. 91-027 at 76 273.

62. Collins (1977) F.L.C. 90-286; Groutsch (1978) F.L.C. 90-461; Kaljo (1978) F.L.C. 90-445; Stowe (1981) F.L.C. 91-027 at 76 273.
63. Hardingham and Neave Australian Family Property Law (1984), 296.
64. Rowan (1977) F.L.C. 90-310; Lyons (1978) F.L.C. 90-459. Note Brazel (1984) F.L.C. 91-568: the award of lump sum maintenance without explanation as to the manner in which it was calculated or what it was intended to represent constituted a failure to give reasons for the decision and was an error of law.
65. Hardingham and Neave Australian Family Property Law (1984), 358.
66. (1984) F.L.C. 91-555.
67. In the present context, there is more likely to be a sole trustee.
68. Hardingham and Neave, op cit., note 1, 357. See Hardingham and Baxt Discretionary Trusts (1975), Chapter 2, for a detailed analysis.
69. Whitehead (1979) F.L.C. 90-673.
70. Whitehead (1979) F.L.C. 90-673. (The wife had established a discretionary trust with her own money from earnings and inheritances. She could compel the trustee as a matter of fact to exercise his discretion in her favour by the implied threat of his removal.) Compare Tiley (1980) F.L.C. 90-898, where the husband's sole voting share in the company would enable him to have the company realise its assets to enable it to repay the loan he had made it.
71. Whitehead (1979) F.L.C. 90-673.
72. See Hardingham and Baxt Discretionary Trusts (1975), Chapter 6, for a detailed analysis of the relevant principles. See also Hardingham and Neave Australian Family Property Law (1984), 359 to 360; Stacy (1977) 31 F.L.R. 34.
73. The English rules relating to the tracing of trust assets have been applied in Australian cases. More recent examples include Brady v. Stapleton (1952) C.L.R. 322; Hodges v. Kovacs Estate Agency Pty. Ltd. (1961) W.A.R. 19; Re Laughton (1962) Tas. S.R. 33; Re Joscelyne (1963) Tas. S.R. 4; Scott v. Scott (1964) 109 C.L.R. 649.
74. (1978) F.L.C. 90-481.
75. Hardingham and Neave Australian Family Property Law (1984), 363.
76. Hadley v. Hadley (1967) 10 F.L.R. 459.
77. Jones v. Jones (1962) 3 F.L.R. 116.
78. For details of the application of this provision, see Chapter Five, under the heading "Section 85A."
79. (1967) 10 F.L.R. 12.
80. Broun "The Jurisdiction of the Family Court over Investment and Trading Trusts" in the report of the symposium The Birth Life and Death of Trusts, held in Melbourne, Sept. 1979, page 22.
81. Meller v. Meller (1967) 10 F.L.R. 12.
82. Broun, op cit., note 2, at 22 to 23.
83. Stacy (1977) F.L.C. 90-324.
84. Murkin (1980) F.L.C. 90-806 at 75 082.
85. Stowe (1981) F.L.C. 91-027.
86. See Chapter Five, under the heading "Section 114(1)".

87. See Hardingham and Neave Australian Family Property Law (1984) 365.
88. (1977) F.L.C. 90-307.
89. Mullane v. Mullane (1983) F.L.C. 91-303.
90. Tansell (1977) F.L.C. 90-307; Sieling (1979) F.L.C. 90-627.; Page (1981) F.L.C. 91-025; Stowe (1981) F.L.C. 91-027.
91. (1979) F.L.C. 90-616.
92. See Hardingham and Neave Australian Family Property Law (1984), fn. 3, 366.
93. (1984) F.L.C. 91-555.
94. See Chapter Five, under the heading "Section 114(3)", for the jurisdictional basis of s.114(3).
95. (1981) F.L.C. 91-000.
96. (1981) F.L.C. 91-000 at 76 061 per Gibbs J., with whom Stephen, Aickin and Wilson JJ. concurred (Murphy J. dissented).
97. Ibid. at 76 061 per Gibbs J.
98. Ibid.
99. (1967) 116 C.L.R. 336.
1. (1976) F.L.C. 90-063.
2. In Rieck (1981) F.L.C. 91-067, Nygh J. asserted that a secured creditor may, under s.114(3), be effectively deprived of part of his security if it can be shown that the rest of it can be realised as readily as the part affected by the order and that such realisation will provide ample funds from which the creditor can be satisfied. Thus the basic rights of the creditor - to the return of all due capital and interest - remained unaffected.
3. Ascot Investments (1981) F.L.C. 91-000 at 76 062 per Gibbs J.
4. Ibid.
5. (1979) F.L.C. 90-616.
6. (1979) 90-616.
7. (1981) 91-000.
8. (1984) F.L.C. 91-555. The decision is analysed by Kovacs (1985) 8 U.N.S.W.L.J. 21.
9. Smith and Saywell (1980) F.L.C. 90-856; Stowe (1981) F.L.C. 91-027; Gillies (1981) 91-054; Harris and Harris; Re Banaco (No. 2) (1981) F.L.C. 91-100; Barro (1983) F.L.C. 91-317.
10. Kovacs disputes that there is a necessity for this connection: (1985) 59 L.I.J. 296, 299.
11. (1981) F.L.C. 91-067.
12. (1984) F.L.C. 91-501.
13. See also Beaumont (1983) F.L.C. 91-321.
14. (1983) F.L.C. 91-311.
15. Contrast af Petersens (1981) F.L.C. 91-095, where the interests of the husband's father were postponed to the needs of the wife since the Court took the view that his rights were unlikely to be enforced.
16. (1984) F.L.C. 91-555. See analysis (1985) Reform 18, 19.
17. (1983) F.L.C. 91-311.
18. Five separate judgments were delivered: Mason J. concurred with Gibbs CJ.; Wilson J. and Dawson JJ. delivered a joint judgment and Murphy J. and Deane J. delivered separate judgments.
19. (1984) F.L.C. 91-555 at 79 500.
20. Ibid.
21. (1981) F.L.C. 91-000.

22. Since Ross-Jones J. had made interim orders for a fixed period so that he could hear submissions relating to jurisdiction, it is difficult to see why the order nisi was granted.
23. (1984) F.L.C. 91-555 at 79 488 per Gibbs CJ. (Mason J. concurring): also Dawson J. and Deane J.
24. (1981) F.L.C. 91-000.
25. (1981) F.L.C. 91-100. (Followed in Howard (1982) F.L.C. 91-279 and Stowe (1981) F.L.C. 91-027.)
26. (1984) F.L.C. 91-555.
27. (1981) F.L.C. 91-100.
28. (1981) F.L.C. 91-000.
29. Kovacs (1985) 59 L.I.J. 296, 300 and (1985) 8 U.N.S.W.L.J. 21, 32, claims that the CCH headnote is in error on this point. However, the Australian Law Reform Commission is of the opinion that Harris was over-ruled on this point: Discussion paper No. 22 Matrimonial Property Law (June 1985), para. 71.
30. Ibid. (both references).
31. (1981) F.L.C. 91-104.
31. (1981) F.L.C. 91-905.
32. (1981) F.L.C. 91-054.
34. (1983) F.L.C. 91-371.
35. (1982) F.L.C. 91-114.
36. (1980) F.L.C. 90-856.
37. (1981) F.L.C. 91-027.
38. Kovacs (1985) 59 L.I.J. 296, 301.
39. (1981) F.L.C. 91-027 at 76 273 (Full Court).
40. (1981) F.L.C. 91-000.
41. Re Dovey; ex parte Ross (1979) F.L.C. 90-616.
42. Such need only be "limited in duration" since the High Court's decision in Mullane v. Mullane (1983) F.L.C. 91-303.
43. (1984) F.L.C. 91-555.
44. (1981) F.L.C. 91-027.
45. (1982) F.L.C. 91-228.
46. (1981) F.L.C. 91-108.
47. (1980) F.L.C. 90-898.
48. Kovacs (1985) 59 L.I.J. 296, 301.
49. (1981) F.L.C. 91-000 at 76 061 to 76 062 per Gibbs CJ.
50. (1982) F.L.C. 91-279. The wife, after separation, became aware that negotiations for the sale of the matrimonial home, which was owned by a company of which the husband was the managing director, were at an advanced stage. The husband had not made a full disclosure of them to the wife and had professed ignorance to the Court. See also Vodenciotis (1979) F.L.C. 90-617, 78 196.
51. Gibbs J.'s obiter dicta in Ascot Investments (1981) F.L.C. 91-000 at 76 061 to 76 062 were relied upon. His Honour expressed a similar view as to the matrimonial home in Re Dovey; ex parte Ross (1979) F.L.C. 90-616. In Ascot, supra., at 76 065, Murphy J. said the exception should embrace all property.
52. (1982) F.L.C. 91-279.
53. Kovacs (1985) 59 L.I.J. 296, 302.
54. As to the Family Court's accrued jurisdiction, see Chapter Four, Part A, of this study.
55. (1984) F.L.C. 91-517 (Full Court).
56. Kovacs (1985) 59 L.I.J. 296, 302, suggests that in the light of the decision in Green (1984) 91-555, the High Court is likely to strike down s.85A because of the power it contains



to affect the interests of third parties. The constitutional validity of a similar provision (S.86(2)) in the Matrimonial Causes Act 1959 (Cth.) was never tested.

#### CHAPTER SEVEN

1. Although these boundaries have been extended by the enactment of the Family Law Amendment Act 1983, operative from 25th November 1983.
2. S.78(3).
3. Re Ross-Jones; ex parte Beaumont (1979) F.L.C. 90-606; Ascot Investments (1981) F.L.C. 91-000; Re Ross-Jones and Marinovich; ex parte Green (1984) F.L.C. 91-555. The Australian Law Reform Commission has expressed the view that the flexibility of the Family Law Act provides more scope for controlling trusts and companies than any alternative matrimonial property system: Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 73.
4. For example, see Russell: Farrelly (1976) 50 A.L.J.R. 594; R. v. Demack; ex parte Plummer (1977) F.L.C. 90-244; Dowal v. Murray (1978) F.L.C. 90-516; R. v. Lambert; ex parte Plummer (1980) F.L.C. 90-904; Gazzo v. Comptroller of Stamps (Vic.) (1981) F.L.C. 90-101; Cormick v. Salmon (1984) F.L.C. 91-554.
5. As to this, see Editorial Comment (1983) 57 A.L.J. 548, 549 to 560; Australian Law Reform Commission Discussion Paper No. 22 Matrimonial Property Law (June 1985), paras. 25, 73.
6. It is submitted, then, that it is not possible for the Federal Parliament to broaden the basis of the matrimonial property jurisdiction (as advocated by Kovacs (1982) 8 Adel. L.R. 163, 176) by resorting to such constitutional powers as that relating to corporations in s.51(xx). (Compare the position under the Trade Practices Act 1974 (Cth.) by examining s.6 of that Act.)
7. Family Law in Australia: Report of the Joint Select Committee on the Family Law Act (July 1980), Vol. 1, para. 5.513.
8. Discussion Paper No. 22 Matrimonial Property Law (June 1985), para. 25. It should be noted that the proposed "interchange of powers" amendment to the Australian Constitution was defeated at the Federal elections of December, 1984, despite the fact that the proposal had received unanimous support at successive constitutional conventions for over a decade: (1985) Reform 18 at 21.
9. (1985) Reform 18 at 21 to 22.
10. Gazzo v. Comptroller of Stamps (1981) F.L.C. 91-101 at 76 731 to 76 732.
11. Antonarkis and Anor. v. Delly and Anor. (1976) F.L.C. 90-063; Ascot Investments (1981) F.L.C. 91-000 at 76 061 per Gibbs J.
12. Re Ross-Jones and Marinovich; ex parte Green (1984) F.L.C. 91-555 at 79 488 per Gibbs CJ.
13. Re Dovey; ex parte Ross (1979) F.L.C. 90-616.
14. See, for example, Fogarty J.'s judgment in Prince (1984) F.L.C. 91-501. See also Chapter Four, Part A, of this study.
15. While taxation is assessed on a progressive scale, there is strong incentive for some tax payers to seek to lessen their personal income by recourse to company and trust structures.

16. The Australian Law Reform Commission has expressed the view that the amendment is sufficiently proximate to the rights and duties arising from the marital relationship to fall within the limits of the "marriage power" that have been set by the High Court.
17. As to the possible interpretations of paragraph (ca)(i) of the definition of "matrimonial cause" in s.4(1), see Chapter Four, Part C, of this study.
18. Contrast the New Zealand position where the very fact of marriage alters the parties' property rights. See further Atkin (1984) 11 N.Z.L.R. 183 at 187.

## SELECTED BIBLIOGRAPHY

### REPORTS AND OTHER OFFICIAL PUBLICATIONS

#### Australia

Family Law in Australia: Report of the Joint Select Committee on the Family Law Act. (July, 1980), Volumes 1 and 2

A.G.P.S., Canberra, 1980

Family Law Council Annual Report 1981-2

A.G.P.S., Canberra, 1982

Family Law Council Annual Report 1982-3

A.G.P.S., Canberra, 1983

Family Law Council Annual Report 1983-4

A.G.P.S., Canberra, 1984

National Women's Advisory Council Community of Property. (Paper prepared by Rebecca Bailey.)

A.G.P.S., Canberra, 1982

The Law Reform Commission General Insolvency Inquiry, Issues Paper No. 6

January 1985

The Law Reform Commission Matrimonial Property Law, Discussion Paper No. 22

June 1985

The Law Commission Matrimonial Property Law, Summary of Discussion Paper No. 22

June 1985

#### Canada

Ontario Law Reform Commission Report on Family Law. Part IV: Family Property Law. (1974)

#### New Zealand

Report on the Matrimonial Property Act 1963. (Report of a Special Committee which was presented to the Minister of Justice in June, 1972)

United Kingdom

Royal Commission on Marriage and Divorce (Cmd. 9678)

H.M.S.O., London, 1955

Law Commission Report No. 86 Third Report on Family Property:

The Matrimonial Home (Co-ownership and Occupation Rights)

and Household Goods.

H.M.S.O., London, June, 1978

Law Commission Discussion Paper No. 103 The Financial

Consequences of Divorce: The Basic Policy. (Cmd. 8041)

H.M.S.O., London, October, 1980

Law Commission Discussion Paper No. 112 The Financial

Consequences of Divorce. (Response to Discussion Paper No. 103)

H.M.S.O., London, December, 1981

MONOGRAPHS

Broun, M.D. and

Fowler S.G. (eds.),

Australian Family Law and Practice

Reporter

CCH Australia Ltd., Sydney, 1984

Chloros, A.G. (ed.)

The Reform of Family Law in Europe

Kluwer, Deventer, Holland, 1978

Cretney, S.M.

Principles of Family Law. (3rd. edition)

Sweet and Maxwell, London, 1979

Cretney, S.M.

Principles of Family Law. (4th. edition)

Sweet and Maxwell, London, 1984

Dworkin, R.

Taking Rights Seriously.

Duckworth, London, 1977

Eekelaar, J.M.

Family Law and Social Policy.

(1st. edition)

Weidenfeld and Nicolson,

London, 1978

Eekelaar, J.M.

Family Law and Social Policy.

(2nd. edition)

Weidenfeld and Nicolson,

London, 1984

Finlay, H.A.

Family Law in Australia (2nd. edition)

Butterworths, Sydney, 1979

307.  
Friedman, W.

Law in a Changing Society

(2nd. edition)

Stevens and Sons, London, 1972

Glendon, M.A.

State, Law and Family: Family Law in  
Transition in the United States and  
Western Europe

North Holland Pubg. Co.,

Amsterdam, 1977

Gray, K.J.

Reallocation of Property on Divorce

Professional Books, Abingdon, 1977

Hardingham, L.J. and

Neave, M.A.

Australian Family Property Law

Law Book Co., Sydney, 1984

McDonald, P. (ed.)

Settling Up: Property and  
Income Distribution on Divorce in  
Australia

Prentice-Hall of Australia,  
Sydney, 1986.

Scutt, J.A. and

Graham, D.

For Richer, for Poorer: Money,  
Marriage and Property Rights

Penguin Books, Ringwood,  
Australia, 1984

Wade, J.H.

Property Division upon Divorce

CCH Australia Limited,  
Sydney, 1982

Wade, J.H.

Property Division upon Marriage  
Breakdown

CCH Australia Limited,  
Sydney, 1984

#### JOURNAL ARTICLES

Atkin, W.R.

"The Survival of Fault in Contemporary  
Family Law in New Zealand".

(1979) 10 Vic. Uni.

Wellington L.R. 93

Bailey, R.J.

"Principles of Property Distribution  
on Divorce - Compensation, Need or  
Community?"

(1980) 54 Australian Law Journal 190

- Bailey, R.J. "The Amendments of 1983 to the Family Law Act 1975"  
(1984) 58 Australian Law Journal 369
- Bates, F. "The Meaning of 'Property' in Family Law Disputes"  
(1978) 8 Family Law 24
- Bates, F. "Private Law and Public Policy: An Extrapolation from Seidler v. Schallhofer".  
(1983) 57 Australian Law Journal 460
- Bates, F. "Some Theoretical Considerations in Modern Family Law"  
(1983) 100 S.A.L.J. 664
- Broun, M.D. "Financial Implications of Family Law"  
(1981) 55 Australian Law Journal 424
- Brown, L.N. "English Law in Search of a Matrimonial Property Regime"  
(1971) 4 Ottawa Law Review 331
- Chisholm, R. and Jessep, O. "Fault and Financial Adjustment under the Family Law Act"  
(1981) 4 Uni. New South Wales L.R. 43
- Comment "Hobart Meeting Looks at Future Directions of Family Law"  
(1984) 19 Australian Law News 7
- Comment "Amendments to the Family Law Act  
(1984) 6 Law Society Bulletin (No.2), 3.
- Comment "Matrimonial Property Law and Elton John".  
(1984) Reform 74
- Comment "Divorce Blues and Hoary Chestnuts"  
(1984) Reform 94
- Editorial Comment "Amendments of 1983 to the Family Law Act"  
(1984) 58 Australian Law Journal 128

- Fineman, M.L. "Implementing Equality: Ideology, Contradiction and Social Change"  
(1983) 2 Wisconsin Law Review 789
- Eekelaar, J.M. "Some Principles of Financial and Property Adjustment on Divorce"  
(1979) 95 Law Quarterly Review 253
- Finlay, H.A. "Reluctant but Inevitable: the Retreat of Matrimonial Fault"  
(1975) 38 Modern Law Review 153
- Finlay, H.A. "Judicial Discretion in Family and Other Litigation"  
(1976) 2 Monash University Law Review 221
- Finlay, H.A. "Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce"  
(1978) 94 Law Quarterly Review 120
- Freeman, M.D.A. "Towards a Rational Reconstruction of Family Law"  
(1972) Current Legal Problems 84
- Freeman, M.D.A. "Divorce Reform - Seven Years Later"  
(1979) 9 Family Law 3 and 40
- Glendon, M.A. "Matrimonial Property: A Comparative Study of Social Change"  
(1974) 49 Tulane Law Review 21
- Glendon, M.A. "Modern Marriage Law and its Underlying Assumptions: The New Marriage and the New Property"  
(1980) 13 Family Law Quarterly 441
- Goodman, E. "Property Law Following Dissolution of Marriage: Is there a Future for Judicial Discretion?"  
(1982) 13 Federal Law Review 131
- Gummow, W.M. "New Model Constructive Trusts for Australia"  
(1978) 94 Law Quarterly Review 351
- Hahlo, H.R. "Matrimonial Property Regimes: Yesterday, Today and Tomorrow"  
(1973) 11 Osgoode Hall Law Journal 455

- Hahlo, H.R. "Deferred Community of Gains - A Note of Warning"  
(1974) 52 Canadian Bar Review 482
- Johnston, J.D. "Sex and Property: The Common Law Tradition., the Law School Curriculum, and Developments toward Equality"  
(1972) 47 New York U.L.R. 1033
- Kahn-Freund, Sir O. "Matrimonial Property - Some Recent Developments"  
(1959) 22 Modern Law Review 241
- Kahn-Freund, Sir O. "Recent Legislation on Matrimonial Property"  
(1970) 33 Modern Law Review 601
- Karowe, M.R. "Marital Property: A New Look at Old Inequities"  
(1974) 39 Albany Law Review 52
- Kovacs, D. "Matrimonial Property Law Reform in Australia: The 'Home and Chattels' Expedient. Studies in the Art of Compromise"  
(1980) 6 Uni. Tasmania Law Review 227.
- Kovacs, D. "The Jurisdiction of the Family Court with Respect to Family Companies"  
(1982) 8 Adelaide Law Review 163
- Kovacs, D. "The Family Court and the Family Company: the Destruction of a Shelter from Financial Obligations"  
(1983) 57 Law Institute Journal 583
- Kovacs, D. "High Court Prunes the Family Tree"  
(1985) 57 Law Institute Journal 296
- Lane, P.H. "Federal Family Law Powers"  
(1978) 52 Australian Law Journal 121
- Lesser, H. "The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot"  
(1973) 23 Uni. Toronto Law Journal 148



- Llewellyn, K.N. "Behind the Law of Divorce"  
(1932) 32 Columbia Law Review 1281  
(1933) 33 Columbia Law Review 249
- Lown, P.J.M. and Bendiak, F.L. "Matrimonial Property - The New Regime"  
(1979) 17 Alberta Law Review 372
- McCall, I.W.P. "Dissolving the Partnership of Marriage"  
(1982) 14 U.W.A.L.R. 365
- MacCallum, S. "Severance of a Matrimonial Joint Tenancy by a Separated Spouse"  
(1980) 7 Monash Law Review 17
- McMeekin, D.V. "Recent Developments in Family Law"  
(1981) 11 Queensland Law Society J. 3
- Miller, J.G. "Family Assets"  
(1979) 86 Law Quarterly Review 98
- Page, G. "The Concept of Fault - Ten Years After"  
(1986) Australian Family Lawyer 11
- Rumble, G.A. "The Nature of Inconsistency under s.109 of the Constitution"  
(1980) 11 Federal Law Review 40
- Sackville, R. and Howard, C. "The Constitutional Power of the Commonwealth to Regulate Family Relationships"  
(1970) 4 Federal Law Review 30
- Scutt, J.A. "Principle and Practice: Defining 'Equality' in Family Property Division on Divorce"  
(1983) 57 Australian Law Journal 143
- Shiff, D. and Waters, P. "Bankruptcy and Family Law: First Come, First Served?"  
(1985) 8 University of New South Wales Law Journal 40

- Simon, Sir J. "The Seven Pillars of Divorce Reform"  
(1965) 62 Law Society Gazette 344
- Stone, O.M. "Matrimonial Property Law: the Movement  
Towards Equality - Separation or  
Community?"  
(1978) 16 Alberta Law Review 375
- Temkin, J. "Property Relations During Marriage in  
England and Ontario"  
(1981) 30 International and  
Comp. L.Q. 190
- Wade, J.H. "Trusts, the Matrimonial Home and  
De Facto Spouses"  
(1979) 6 Uni. Tasmanian Law  
Review 97
- Wade, J.H. "Comments: Measuring the Chancellor's  
Foot - Matrimonial Property Law in  
Australia"  
(1984) 15 Federal Law Review 76
- Walker, G. "Setting Aside Transactions and Orders  
Relating to Property under the  
Australian Family Law Act"  
(1980) 7 Adelaide Law Review 376

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## COMMONWEALTH OF AUSTRALIA.

Commonwealth of Australia Constitution Act 1900, 63 & 64 Victoria (The Constitution).

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